Jeremiah Smith 1791

AN

HISTORICAL TREATISE

ON THE

FEUDAL LAW,

AND THE

CONSTITUTION AND LAWS

OF

ENGLAND.

This work was first published
in 1772 The Monthly Review
was highly commend it. They
speak ofits as an interesting &
very instructive performance
and of the Author as a learned
& ingenious writer & a zealous
friend to the original freedom
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LECTURES

ON THE

CONSTITUTION AND LAWS

OF

ENGLAND:

WITH A COMMENTARY ON

MAGNA CHARTA,

AND ILLUSTRATIONS OF MANY

OF THE

ENGLISH STATUTES.

BY THE LATE

FRANCIS STOUGHTON SULLIVAN, *LL. D.*

ROYAL PROFESSOR OF COMMON LAW IN THE

UNIVERSITY OF DUBLIN.

THE SECOND EDITION.

TO WHICH AUTHORITIES ARE ADDED, AND A DISCOURSE IS PREFIXED, CONCERNING THE LAWS AND GOVERNMENT OF ENGLAND.

BY GILBERT STUART, LL. D.

—DUBLIN,—

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TO THE RIGHT HONOURABLE

FREDERICK LORD NORTH,

KNIGHT OF THE MOST NOBLE ORDER OF THE GARTER,

FIRST LORD OF THE TREASURY,

CHANCELLOR OF THE EXCHEQUER,

AND

CHANCELLOR OF THE UNIVERSITY OF OXFORD.

MY LORD,

I AM ambitious of giving dignity to this WORK by inſcribing it to your Lordſhip; and I conceive that it has a natural claim to your protection. It regards thoſe laws and that conſtitution which, at a moſt critical period, you were called to defend; and of which the important purpoſes are the ſecurity and the happineſs of a free people.

In this illuſtrious rank which divides your cares between prerogative and liberty, and in which you ſupport the luſtre of the Crown, while you guard the independence of the ſubject; the greateſt occaſions are afforded to diſtinguiſh the generoſity of public virtue, and to employ a capacity enlarged alike by reflection and experience.

But it does not become me to ſay with what honour to yourſelf, and with what advantages to the nation, you ſuſtain the arduous charge of government. To poſterity, which will not be ſuſpected of flattery, it muſt be left to celebrate the merits of an Adminiſtration, too vigorous to yield under difficulties, and of which the glory has increaſed with danger.

I am, with the greateſt reſpect,

MY LORD,

Your Lordſhip's

Moſt obedient,

And moſt humble ſervant,

GILBERT STUART.

ADVERTISEMENT.

THE following LECTURES were delivered in the Univerſity of DUBLIN, and procured a very high Reputation to their Author. The Reſearches they contain into the Nature and Hiſtory of the FEUDAL LAWS, were eſteemed extenſive and ingenious; and the Deſcription they exhibit of the ENGLISH CONSTITUTION, will be allowed to be particularly intereſting. Theſe Advantages have occaſioned their Publication. It was thought, that Papers, which had done ſo much Honour to DR. SULLIVAN, when alive, ought to illuſtrate his Memory; and that they might prove of Uſe to the preſent Age, and to poſterity.

THE Authorities aſſigned for DR. SULLIVAN's Opinions and Reaſonings are furniſhed by the EDITOR. They are not, perhaps, in every Inſtance thoſe to which he himſelf would have appealed. This could not have been expected. They are ſuch, notwithſtanding, as will aſſiſt the Student; and the Preliminary DISCOURSE, it is hoped, will not be thought an uſeleſs or improper Addition to his LECTURES.

It will be a Pleaſure to the EDITOR to reflect that he has endeavoured to pay a tribute of reſpect to the Writings of a virtuous Man and an ingenious Lawyer, whom an immature Death had raviſhed from his Friends and from Society.

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CONCERNING THE

LAWS AND GOVERNMENT

OF

ENGLAND.

THE laſt conqueſt attempted under the Roman Republic was that of Britain. Julius Cæſar, on the pretence that its ſtates had given aſſiſtance to the Gauls, but chiefly from a motive of glory, carried the Roman Eagles into a country from which he was to retreat with diſgrace. It required a length of time, and a ſucceſſion of able Proconſuls to reduce to ſubjection Communities of fierce and independent warriours; and policy effected what could not be operated by arms. The Britains were debauched into a reſemblance with a moſt corrupted people. They renounced the fatigues of war for the blandiſhments

diſhments of peace. They forſook their huts for palaces; affected a coſtlineſs of living, and gave way to a ſeducing voluptuouſneſs. They ſunk into an abject debaſement, without having run that career of greatneſs, which, in general, precedes the decline of nations; and, when they were trained to an oppreſſive yoke, the Romans found it neceſſary to abandon them. The impreſſion which the barbarous tribes had made upon the Empire required the preſence of the diſtant legions 1.

The liberty which the Romans, on their departure, preſented to the Britains, could not be enjoyed by them. Timid and daſtardly, they fled before the Picts and Scots, and allowed their country to be ravaged by a cruel and undiſciplined enemy. Amidſt the ſuggeſtions of their fear, they forgot every principle of policy and of prudence; they called to their defence a foreign valour. The Saxons were invited to fight their battles; but they acted not long as protectors. They were allured by the proſpect of compleating a ſettlement in this iſland; and the total ruin of its inhabitants was projected. Deſpair gave a temporary vigour and union to the Britains. They were unable, however, to reſiſt a people, accuſtomed to victory, and directed by experienced commanders. The valiant and magnanimous fell by the ſword; the ignoble ſubmitted to an

1. Cæſar de bell. Gal. lib. 4. c. 18. Tacit. vit. Agric. Dion Caſſius, vit. Sever.

an ignominious ſervitude: Wales afforded a retreat to ſome; and others found ſhelter in Armorica 2.

But, if the Saxon conqueſt was ruinous to the Britains, it was yet attended with conſequences which were laſting and important. The ſun of liberty reviſited the iſland, and diſplayed itſelf with uncommon luſtre. The Saxons, independent in their original ſeats, ſubmitted not to tyrants in their new ſituation. They laid the foundation of a political fabric, the moſt valuable that has, at any time, appeared among men; and which, though ſhaken by violent revolutions, a train of fortunate circumſtances has continued down to the preſent times. Fluctuations have taken place between prerogative and liberty; but, accident and wiſdom have ſtill conſpired to preſerve us from the fate of the other kingdoms of Europe.

During the exiſtence, however, of the Heptarchy, the Saxons ſeem to have departed little from their original condition of Society. The ferocious picture which Tacitus has drawn of the Germans, is, with a few exceptions, characteriſtic of them. If we admire their heroiſm, we are ſhocked with their cruelty; and if we are in love with their democratical maxims, we muſt ſometimes regret their contempt of juſtice and of order. The moſt important innovation introduced into their manners during this æra was their converſion to chriſtianity. But their ac-

 quaintance

2. Bede, lib. 1.

quaintance with this mode of faith failed to be productive of beneficial conſequences. As they received it from the corrupted ſource of the church of Rome, it involved them in endleſs and idle diſputes. It detracted from the vigour of their underſtanding, by turning their attention from civil precautions, and the arts of policy, to the relics of ſaints, and the ſeverities of religious diſcipline. The power derived from it intoxicated eccleſiaſtics: They preſumed to interfere in affairs of ſtate; and, a foundation ſeemed already to be laid for ſubjecting the iſland to the dominion of the Roman Pontiff3.

When the Saxon kingdoms were conſolidated into one ſtate under Egbert, improvements were made in civility and knowledge. The incurſions of the Danes, and the diſorders reſulting from them, called forth the ability and the wiſdom of the Anglo-Saxon Princes. Alfred, notwithſtanding the other important tranſactions of his reign, found leiſure to frame into a code the laws of his predeceſſors, and thoſe Germanic cuſtoms which had retained their influence. King Edgar has likeways come down to us with the character of an able legiſlator. The eſtabliſhment of the Danes in England gave occaſion to new uſages and new laws; but theſe were neither many, nor conſiderable4. The ability of Canute did not allow him to

3. Bede, lib. 3. and 5.

4. The diviſion of laws, during the Anglo-Saxon period, into Weſt-Saxon-lage, Mercen-lage and Dane-lage, was not of any importance.

to make distinctions between his Danish and his English subjects; and the sceptre was not long in returning to a prince of the Saxon line. No Monarch was ever more acceptable to a State than Edward the Confessor; and, though he had rather the qualities of a saint than those of a king, his laws have been highly extolled. They were strenuously contended for during the administration of the earlier Norman princes; they kept their ground in opposition to the clergy and the imperial institutions; and they furnished the foundation of what is termed the Common Law of England 5.

In

importance. These differed not essentially from one another. "Our Saxons, says Sir Henry Spelman, though divided into "many kingdoms, yet were they all one in effect, in manners, "laws and language: So that the breaking of their government "into many kingdoms, or the reuniting of their kingdoms into a "monarchy, wrought little or no change amongst them touching "laws. For though we talk of the *West-Saxon-law*, the *Merci-* "*an-law* and the *Dane-law*, whereby the west parts of *England*, "the middle parts, and those of *Norfolk*, *Suffolk* and the north, "were severally governed; yet held they all an uniformity in sub- "stance, differing rather in their *mulcts*, than in their *canea*; that "is, in the quantity of fines and amerciaments, than in the course "and frame of justice." *Relig. Spelm.* p. 49.

5. King Edward's laws were compiled from those of former princes, and abolished any little peculiarities which distinguished the West-Saxon, Mercian and Danish laws, subjecting the whole kingdom to a common law. His code, accordingly, was termed *lex Angliæ*, or *lex terræ*. No correct copy of it has descended to us. Those regulations, which pass under his name in the editions

In no portion of the Anglo-Saxon period does the power of the Sovereign appear to have been exorbitant or formidable. The enaction of Laws, and the ſupreme ſway in all matters, whether civil or eccleſiaſtical, were veſted in the *Wittenagemot*, or great National Aſſembly6. This council conſiſted of King, Lords, and Commons, and exhibited a ſpecies of government, of which political liberty was the neceſſary conſequence; as its component parts were mutually a check to one another. The free condition of the northern nations, and the peculiarity of their ſituation when they had made conqueſts, gave riſe to this valuable

of the Saxon-laws by Lambard and Wilkins, have evidently ſome interpolations. Traces of them are to be ſeen in Hoveden and Knyghton; and remains of them are likeways to be found in the laws of William I. From the time of this Prince to that of King John, they continued, with the addition of ſome Norman laws and cuſtoms, the law of the land. *Præcipimus*, ſays William, *ut omnes habeant et teneant leges Edwardi regis in omnibus rebus, adauctis his quas conſtituimus ad utilitatem Anglorum. Leg. Guliel. ap.* Wilkins, p. 229. By the influence of the Barons under the laſt Prince, they were drawn up in the form of *Magna Charta*. For the *great charter* was not what ſome partial writers have repreſented it, a conceſſion of privileges extorted by violence, but a declaration of the principal grounds of the *antient* and fundamental laws of England, and a correction of the defects of the common law. See *Lord Coke 2 Inſt. and Lord Lyttleton's hiſt. of Henry II. vol. I.* p. 42. 526.

6. *Wittenagemot*, imports a council of wiſe men; the Saxon word *witta* ſignifying a wiſe man; and the Britiſh word *gemot* expreſſing a ſynod or council. During the Heptarchy, each kingdom had its *Wittenagemot*.

valuable ſcheme of adminiſtration, and taught the politicians of Europe what was unknown to antiquity, a diſtinction between deſpotiſm and monarchy.

The executive power remained with the crown; but it was the united aſſent of the three eſtates which conſtituted the legiſlature. The Lords were ſpiritual as well as temporal; for notwithſtanding that the Eccleſiaſtics preached humility, and the contempt of private intereſt, they had been ſeized with ambition and the love of ſuperiority[7]. The people exerciſed an authority that was important and ample. The counties appeared by their knights, and the cities and boroughs by their citizens and burgeſſes; the Commons, as at this day conſtituted, being included under the appellation of the *wites* or *ſapientes*, who are always mentioned,

7. The lay lords were the earls, thanes, and other nobility of the kingdom. The ſpiritual lords were the biſhops and dignitaries of the church, whoſe poſſeſſions were held in Frankalmoigne. After the conqueſt, they were ſubjected to military ſervice and held by barony. What may ſeem extraordinary, Abbeſſes were alſo in uſe to ſit in the Saxon Wittenagemots. In Wightred's great council at Beconceld, *anno* 694. the Abbeſſes ſat and deliberated, and ſeveral of them ſubſcribed the decrees made in it. *Spel. conc. vol. I.* The abbeſſes appeared alſo in Ethelwolf's parliament at Wincheſter *anno* 855. *Ingulph, edit Savil.* 862. And king Edward's charter to the abbay of Croyland was ſubſcribed by an abbeſs. Even in the time of Henry III. and in that of Edward I. it appears that four abbeſſes were ſummoned to parliament; thoſe of Shaftſbury, Berking, St. Mary of Wincheſter, and of Wilton. *Tit. hon. p.* 729. *and Whitelock's notes upon the king's writ for chooſing members of Parliament, vol. I. p.* 479. 480.

mentioned as a part of the Anglo-Saxon parliament 8. The affertors

8. The preambles of the Saxon laws expreſs an anxiety to pleaſe the people, and allude to their conſent in enacting them. The laws of king Ina begin thus: *Ego Ina Dei gratia Occiduorum Saxonum Rex, cum conſilio et cum doctrina Cenredæ patris mei, et cum omnibus meis ſenatoribus, et ſenioribus* SAPIENTIBUS POPULI MEI, *et multa etiam ſocietate miniſtrorum Dei, conſultabam de ſalute animæ noſtræ, et de fundamento regni noſtri, ut juſtæ leges, et juſta ſtatuta per ditionem noſtram ſtabilita et conſtituta eſſent, ut nullus ſenator nec ſubditus noſter poſt hæc has noſtras leges infringeret.* See *LL. Anglo-Saxon, ap. Wilkins, p.* 14. The preambles to the laws of the other princes are nearly ſimilar; and thoſe of Edgar, Ethelred and Canute, may ſerve as additional examples. 1. Leges Eadgari regis. *Hoc et inſtitutum quod Eadgarus cum* SAPIENTUM SUORUM *conſilio inſtituit in gloriam Dei, et ſibi ipſi in dignitatem regiam, et in utilitatem regiam, et in utilitatem omni populo ſuo.* 2. Leges Æthelredi regis. *Hoc eſt conſilium quod Æthelredus rex, et* SAPIENTES EJUS *conſultaverunt ad emendationem pacis omni populo Wodſtoci in regione Merciorum, ſecundum Angliæ leges.* 3. Leges Cnuti regis. *Hoc eſt conſilium quod Cnutus rex, totius Angliæ et Danorum et Norwegorum rex, cum* SAPIENTUM SUORUM *conſilio ſancivit, in laudem Dei, et ſibi ipſi in ornamentum regium, et ad utilitatem populi; et hoc erat ſacris natalibus domini noſtri Wintoniæ.* See *Wilkins*, p. 76. 102. 126.

In the 8th law of Edward the Confeſſor we read, *Hæc conceſſa ſunt a rege, baronibus et* POPULO; and in his 35th law we have the following words: *Hoc enim factum fuit per* COMMUNE CONSILIUM *et* ASSENSUM *omnium epiſcoporum, principum, procerum, comitum, et omnium* SAPIENTUM *ſeniorum et* POPULORUM *totius regni, et per præceptum regis Inæ prædicti.* See Wilkins, p. 198. The laws of Edward are, I know, to be read with diſtruſt; but they are allowed to contain genuine relics of that prince; and, in the preſent

aſſertors of prerogative, indeed, have affirmed that theſe were judges

ſent caſe, there ſeems no reaſon for ſuſpicion. Their *appeal* of conſequence to the *aſſent* of the *people* muſt be allowed to be of authority. For, if ſuch *aſſent* was not known and believed in that age, how is it poſſible that they could appeal to it? The advocates for the late origin of the houſe of commons will not ſurely ſuppoſe, that the Confeſſor alluded prophetically to tranſactions which were not to happen till the reigns of Henry III. and Edward I.

In the *Mirroire de Juſtices*, it is expreſsly ſaid, that no king, during the Saxon times, could change his money, nor enhance nor impair it, nor make any money but of ſilver, without the *aſſent* of the *Lords* and all the COMMONS. Part of this book is conceived by Sir Edward Coke to have been written before the conqueſt; and additions were made to it by Andrew Horn in the reign of Edward I. from old MSS. the authors of which muſt have ſeen ancient rolls and records. Matter, alſo, from more exceptionable materials, it is to be thought, was ſuperadded by him. The book is notwithſtanding of conſiderable weight and authority. *Mirroire des Juſtices*, cap. 1. ſect. 3. *Atkyns on the power of parliament.*

Concerning the high antiquity of the *commons*, Sir Edward Coke is clear and explicit; and he has founded chiefly his opinion on the ancient tract, which bears this title: *Modus quomodo parliamentum regis Angliæ et* ANGLORUM SUORUM, *tenebatur* TEMPORIBUS REGIS EDWARDI, *filii* REGIS *Ethelredi, qui modus recitatus fuit per diſcretiores regni coram Willielmo duce Normanniæ conqueſtore et rege Angliæ, ipſo conqueſtore hoc præcipiente, et per ipſum approbatus, et ſuis temporibus et temporibus ſucceſſorum ſuorum regum Angliæ uſitatus.* Other authors beſide Lord Coke have paid great reſpect to this treatiſe. It is to be acknowledged, however, that Mr. Selden has demonſtrated that this tract could not poſſibly be of the age of the Confeſſor, from its employing terms which were not in uſe

judges or men ſkilled in the law; but this opinion they ſupport

uſe till long after. But this does not wholly derogate from its force as to the point in queſtion. For, allowing it to have been written in the reign of Edward III. the period which, with great probability, ſome writers have aſſigned to it, it yet proves that the ſenſe of that period was full and ſtrong with regard to the antiquity of the conſtitution, as conſiſting of king, lords and *commons*; a circumſtance which muſt have great weight in oppoſition to thoſe, who would make us believe, that our conſtitution, as ſo formed, was unknown till the times of Henry III. and Edward I. 4 *Inſtitute, p.* 2. 12. *Selden, tit. hon. p.* 739. 743.

" In the time of king Canutus, ſays Whitelocke, to a charter " then graunted to the monaſtery of St. Edmond's Bury (probably " in a publique councell) after the ſubſcriptions of the queen and " dukes, followes, *I Oſlaus*, KNIGHT, *I Thored*, KNIGHT, *I* " *Thurkell*, KNIGHT, and ſo of others. How many theſe were, " or how for ſeveral counties, doth not appear; nor in that parle- " ment of the ſame king (for ſo is teſtified by the diſcription of it) " where it is ſayd, that *the king calling all the prælats of his king-* " *dome, and the nobles, and great men to his parlement*, there were " preſent biſhops, abbots, dukes, earles, *with many* MILITIBUS, " butte the certain number is not extant; nor of thoſe which are " mentioned in the parlement of Edward the Confeſſor, where " after the king, queen, archbiſhops, biſhops, abbots, king's chap- " leins, Thaines, KNIGHTS are reckoned in that parlement." *Notes upon the king's writ*, vol. 1. p. 437.

Lambard, Dugdale, and other antiquaries, produce a very ſtrong evidence of the antiquity of the repreſentation of boroughs, by evincing, " That in every quarter of the realm, a great many " boroughs do yet ſend burgeſſes to parliament, which are never- " theleſs ſo ancient, and ſo long ſince decayed, and gone to " nought

ſupport by very exceptionable evidence9 : And it has been conjectured, with no meaſure of propriety, by ſome compromiſing writers, that all the more conſiderable proprietors of land had a title, without any election, to give their votes in the Wittenagemot 10.

In

" nought, that it cannot be ſhewed that they have been of any " reputation at any time ſince the Conqueſt ; and much leſs that " they have obtained this privilege by the grant of any king ſuc- " ceeding the ſame. So that the intereſt which they have in par- " liament groweth by an ancient uſage before the Conqueſt, where- " of they cannot ſhew any beginning." *Lambard Archeion, p.* 256. 257. *Coke Epiſt.* 9. *Rep. Dugdale, Jurid. p.* 15.

This matter receives confirmation from what we are told of the *boroughs of ancient demeſne*. " Theſe, ſays Whitelocke, were te- " nants of the demeſne lands of William I. and of Edward the " Confeſſor ; who (to the end that they might not be hindered " from their buſineſs of huſbandry of the king's lands) had many " privileges, whereof one was, that they ſhould not be compelled " to ſerve in parliament. Another was, that they ſhould not con- " tribute to the wages of KNIGHTS OF THE SHIRE. Which pri- " vileges they ſtill enjoy, and had their beginning in the times of " William I. and of the Confeſſor, whoſe tenants they firſt were, " as appears in the book of Domeſday, and is a ſtrong proof, that " KNIGHTS and BURGESSES were then in parliament." *Notes " upon the King's Writ*, vol. 11. p. 139.

See alſo the 22d note to the preſent tract.

9. The law was not then a particular profeſſion.

10. On the following record in the regiſter of Ely, this notion ſeems to be founded. *Abbas Wulfricus habuit fratrem, Cuthmundum*

In inferior aſſemblies, and in the forms of judicial proceedings, the marks are alſo to be traced of the power of the people, and of a limited adminiſtration. The hundred and county courts were admirably calculated for the protection of the ſubject. They were compoſed of *freeholders*, who were bound, under a penalty, to aſſemble at ſtated times; and who, with the hundreder, earl and biſhop, gave deciſion in all matters of civil, criminal, or eccleſiaſtical import. A very powerful obſtruction was thus created to the oppreſſions of the great. And, in the inſtitution of a *jury*, our anceſtors poſſeſſed a bulwark, the moſt efficacious and noble that human wiſdom has ever deviſed for the ſecurity of the perſons and poſſeſſions of men [11].

Nor

mundum vocabulo; cui filiam præpotentis viri in matrimonium conjungi paraverat; ſed quoniam ille XL. hidarum terræ dominium minus obtineret, licet nobilis eſſet, inter proceres TUNC *nuncupari non potuit.* It is ſomewhat remarkable, that Mr. Hume is among thoſe, who, reſting on this foundation, would make us conceive, that a perſon who had 40 hides of land, could, without being noble, give his voice in the Wittenagemot. *Hiſt. of Eng. vol. I. p.* 145. The paſſage, however, properly underſtood, ſerves to ſhew, that, in the courſe of time, the attendance of the Nobles in parliament, having been deemed an expenſive ſervice, a law was made to relieve thoſe of them from it who were not poſſeſſed of 40 hides of land. The reader may conſult *hiſt. Elienſ. c.* 36. 40. *ap. Gale*, the authority appealed to by Mr. Hume.

11. It is perhaps impoſſible to aſcertain the æra of this invaluable inſtitution. It loſes itſelf in a diſtant antiquity. The Saxon laws mention

Nor was the condition of thoſe times ſo entirely deſtitute of grandeur as ſome hiſtorians have been fond to aſſert. Even in the age of Tacitus, London was a port not unknown to navigators and traders 12; and we have the authority of Bede, that England abounded at an early period with cities which were wealthy and populous 13. Alfred was particularly attentive to encourage induſtry, trade and manufactures; and even imported the luxuries of life from the moſt diſtant countries 14. It was a law of Athelſtane, that the merchant, who had performed at his own expence

mention it as a known invention. See *L L. Ethelr. c.* 4. *Senat. Conſult. de Mont. Wal. c.* 3. *ap. Wilkins.* See alſo *Nicolſon, Præfat. ad Leg. Anglo-ſax. Spelm. Gloſſ. and Coke's 1ſt Inſtitute.* Olaus Wormius traces it to a remote age among the Danes; and Stiernhook among the Swedes. *Monument. Dan. lib.* 1. *c.* 10. *De Jure Sueon. et Goth. vetuſto. c.* 4.

12. Annal. lib. 14. c. 33. *Copia negotiatorum et commeatuum maxime celebre.* The city of London in the Daniſh times was able to pay L. 11,000 as its proportion of 70,000, a tax then impoſed on the nation. Aſſer, in the life of Alfred, refers to above 120 cities, boroughs and villages.

13. Lib. 1. See alſo Holingh. Chron. p. 192.

14. Spelman, life of Alfred, b. 2. p. 28. Malmeſb. lib. 2. c. 4. A writer in Du Cheſne having occaſion to mention the firſt return of duke William to Normandy, after his invaſion of England, has the following paſſage: *Attulit quantum ex ditione trium Galliarum vix colligeretur argentum atque aurum: Chari metalli abundantia multipliciter Gallias terra illa* [*Anglia*] *vincit. Geſt. Gul. Conqueſ. p.* 210.

expence three long and hazardous voyages, ſhould be inveſted with nobility 15. Civility and knowledge, commerce and wealth increaſed under Edgar, whoſe ability and affable manners allured many foreigners to his court; and affairs did not degenerate, nor was England leſs reſpectable under the peaceful and fortunate adminiſtration of Edward the Confeſſor.

But the beautiful pre-eminence on the ſide of the people, enjoyed during the Saxon times, was ſoon to be violated. The invaſion of the duke of Normandy was about to introduce ſanguinary and oppreſſive times. We muſt not, however, with a multitude of authors, be deceived into the opinion, that this warriour and ſtateſman atchieved a *conqueſt* over the conſtitution and the people of England. He made effectual by arms his right of ſucceſſion to Edward; but he received the crown with all its inherent properties. He took the oath which had been preſcribed to the Saxon princes; he acknowledged himſelf to be equally under reſtraint and limitation; and he engaged to preſerve the immunities of the church, and to act according to the laws. The victory he obtained at Haſtings was over the perſon of Harold, and not over the rights of the nation 16.

His

15. LL. Anglo-Saxon, ap. Wilkins. p. 71.

16. The Confeſſor dying without iſſue, the competitors for the crown were Edgar Atheling, Harold, and duke William. The

firſt

His acceſſion, at the ſame time, it will be allowed, was a ſource of inquietude and confuſion. Dominion is ever conſequent on property; and the forfeited eſtates of the nobility and the landed proprietors who had aſſiſted Harold, or who had afterwards joined in inſurrections, having been beſtowed by him on his officers; and the high rank of many of theſe requiring very ample retributions, a great proportion of territory was neceſſarily veſted in the hands of a few. Nor was it favourable to the ſpirit of democracy,

firſt had not capacity to ſway the ſceptre; and the ſucceſſion of kings was not yet directed by very regular maxims. Harold was a ſubject, and in poſſeſſion of no legal claim. William was related to Edward, and urged the deſtination of that prince to ſucceed him. On theſe grounds he invaded England; and by oppoſing Harold, he meant to ſecure what was his right of ſucceſſion. His victory accordingly gave him the capacity of a ſucceſſor, and not of a conqueror. That the quarrel was perſonal with Harold may be even conceived from the circumſtance that duke William offered to decide their diſpute by ſingle combat. *Hale, hiſt. of the com. law, ch. v. Cook, argument. antinorm.*

With regard to William's right of ſucceſſion, the beſt account appears to be that which is found in Ingulphus, William of Poictiers, William Gemetenſis, and Ordericus Vitalis, who were all of them his contemporaries. Theſe authors inform us, that king Edward ſent Harold into Normandy to aſſure duke William of his having deſtined him to be his ſucceſſor to the crown of England; a deſtination which he had before obſerved to him by Robert Archbiſhop of Canterbury; and which appears to have been made with the conſent of the national council. And of this relation there remains a very curious and deciſive confirmation. It is a tapeſtry

democracy, that the donations of William were governed by the more extended notions of the feudal law.

This polity, which was common to the northern tribes, had not been unknown to our Saxon anceſtors; but, though they were familiar with grants, which were precarious, or which endured for a term of years, or during the life of the feudatory, they had ſeen few examples of the perpetuity of the fief. They had not been accuſtomed to the laſt ſtep of the feudal progreſs; but a tendency to its eſtabliſhment was obſervable among them; and, if the invaſion of William had never taken place, the inſtitutions of

tapeſtry found at Bayeux, and ſuppoſed to be the work of Matilda the wife of duke William, and of the ladies of her court, in which Harold is repreſented on his embaſſy. See *a deſcription of this tapeſtry by Smart Lethieullier, Eſq. ap. Du Carrel's Anglo-Norman antiquities.* It is ſurpriſing, when theſe particulars are conſidered, that Mr. Hume ſhould have given his ſanction to the opinion that William's right was entirely by war, and that he ſhould have conceived that thoſe who refuſe to this prince the title of *Conqueror* ſhould reſt ſolely or chiefly on the pretence that the word *conqueror* is in old books and records applied to ſuch as make an acquiſition of territory by any means. *Hiſt. of Eng. vol.* 1. *p.* 200. It is true, that Sir Henry Spelman and other antiquaries have ſhown, that *conqueſtus* and *conquiſitio* were in the age of duke William ſynonymous with *acquiſitio;* but it is no leſs true, that the authors who refuſe to duke William the title of Conqueror, reſt on much ſuperior evidence. It is not with pleaſure that I differ from this great authority; but, no man has a title to enquire who will not think for himſelf; and the moſt perfect productions of human wit have their errors and their blemiſhes.

of this law had yet arrived at their higheſt point. He only haſtened what the courſe of time was about to produce by ſlow degrees: It was a reſult of his adminiſtration, that, before the end of the reign of Henry II. fiefs, in their more enlarged condition, had ſpread themſelves over England 17.

This plan of political law, which had been propitious to liberty and conqueſt in its riſe, was prejudicial to both in its decline; and the ſame inſtitutions, which in one ſituation conducted to greatneſs, led the way in another to confuſion and anarchy 18. The advantages which diſtinguiſhed their earlier ſtate, were unknown when they had attained the ultimate ſtep of their progreſs. When fiefs had become hereditary, the aſſociation of the chief and the retainer, or the lord and his vaſſal, had no longer for its ſupport, any other tie than that of land 19; and, if the poſſeſſor of a fief was leſs attached to his followers, he was leſs dependent on, and leſs connected with his prince. The ſyſtem had loſt the circumſtances, which formerly had fitted it ſo admirably for war; and the few regulations it included with regard to peace and domeſtic policy, were rather calculated for the narrow circle of a naſcent com-

17. See farther, an Hiſtorical Diſſertation concerning the antiquity of the Engliſh conſtitution. Part 2.

18. Ibid.

19. Ibid.

munity, than for the complicated fabric of an extenſive empire.

The exorbitant grants, which it was neceſſary that duke William ſhould make, the full eſtabliſhment of the perpetuity of the fief, and the conſequent inveſtment of offices of rank and of dignity in particular families, introduced all the diſorders of ariſtocracy. The moſt princely dominion was in general claimed and exerciſed by the great 20. They aſſumed the right of declaring war againſt each other of their private authority; they coined money; and they affected to exert without appeal every ſpecies of juriſdiction. But while they diſputed in the field the prize of military glory, or vied in diſplays of magnificence and grandeur, their tenants and vaſſals were oppreſſed to ſupply their neceſſities; and, amidſt the unbounded rapine and licentiouſneſs which aroſe, no legal protection was afforded to individuals 21. There was no ſafety for the helpleſs but in

20. It is a very curious fact, that even ſome of the Anglo-Saxon nobles had all the prerogatives of earls-palatine. Alfred, we are told, put to death one of his judges for having paſſed ſentence on a malefactor for an offence which had been committed *where the king's writ did not paſs*. *Mirroire de Juſtices, ch.* v. And in Selden we meet with earls who had entirely the civil and criminal juriſdiction in their own territories. *Tit. Hon. part* 2. *ch.* v. If there were no other proofs than theſe, they would be ſufficient to evince the reality of fiefs among the Anglo-Saxons.

21. Madox, hiſt. of Excheq. *Erant in Anglia quodammodo*, ſays an old writer concerning the age of Stephen, *tot reges vel potius tyranni, quot domini Caſtellorum. Gul. Neubrigenſ.*

in aſſociations with the powerful; and to theſe they paid attention and ſervice. The tribunals of juſtice became corrupted; and deciſions were publicly bought from the judges. New ſources of oppreſſion were thought of; and none were infamous enough to be rejected. The feudal caſualties were exacted with the moſt rigorous ſeverity; and, while the kingdom appeared to be divided into a thouſand principalities, the people were nearly debaſed into a ſtate of ſervility.

On a ſuperficial view, one would be apt to imagine, that, in regard to competition the nobles of thoſe times were conſiderably an overmatch for the prince. But Barons, whoſe chief recommendations were the military virtues, who were haughty and independent, and often inflamed againſt each other with the fierceſt animoſity, could not always act in a body, or by fixed and determined maxims. It was not ſo with the ſovereign: The maſter of operations, which depended on himſelf, he could ſpeculate in ſilence, and watch the opportunities of action. The advantages he derived from his ſituation were powerful. Not to mention his prerogatives and his revenue; the returns of feudal ſervice reminded the nobility of their ſubjection to him; and the inferior orders of men, regarding theſe as their immediate oppreſſors, looked up to him as to their guardian.

Amidſt the lawleſs confuſion introduced by the ſtruggles between regal and ariſtocratical dominion, the conſtitu-

tional rights of the Commons ſeem to have received a temporary interruption, and to have been inſulted with a temporary diſregard. Their aſſembling in parliament grew to be leſs frequent and leſs effectual; and for a ſeaſon, perhaps, was altogether ſuſpended. But notwithſtanding the diſorder occaſioned by theſe ſtruggles, they were in time productive of effects which were beneficial to the people. For if the charter, confirming their *ancient* liberties, which was granted by Henry I. renewed by Stephen, and continued by Henry II. had remained without a due and proper force; the confederacy of the barons produced under king John and Henry III. the revival and the exerciſe of the moſt important privileges. The MAGNA CHARTA brought back, in ſome meaſure, the golden times of the Confeſſor. It appeared to the barons, that they could not expect the aſſiſtance of the people, if, in treating with John, they ſhould only act for their own emolument; they were therefore careful that ſtipulations ſhould be made in favour of general liberty. The people were conſidered as parties to tranſactions which moſt intimately concerned them. The feudal rigours were abated; and the privileges, claimed by the more dignified poſſeſſors of fiefs, were communicated to inferior vaſſals. The cities and boroughs received a confirmation of their *ancient* immunities and cuſtoms 22. Proviſions were made for a proper

22. *Civitas London. habeat omnes* ANTIQUAS LIBERTATES *et* LIBERAS CONSUETUDINES SUAS *tam per terras quam per aquas. Præterea*

proper execution of juſtice; and in the reſtraints affixed to the power of the king and the nobility, the people found protection and ſecurity.

The ſovereign, no leſs than the nobles, was an enemy to public liberty; and yet both contributed to eſtabliſh it. Stephen gave the example of a practice, which as it ſerved to enfeeble the ariſtocracy, was not forgotten by his ſucceſſors. In the event of the reverſion to the crown of a great barony, he gave it away in different diviſions; and the tenants *in capite* produced in this manner, threw naturally their influence into the ſcale of the commons. The partitions, alſo, which the extravagance of the nobility, and the failure of male-heirs, introduced into great eſtates, contributed to reſtore the democracy. It was a reſult, likeways, of the madneſs of the Cruſades, that many adventurers to the eaſt returned with more cultivated manners, and more improved notions of order and liberty; and the romantic glory of acquiring a renown there, had induced many potent barons to diſpoſe of their poſſeſſions. The boroughs haſtened to recover the ſhock, which they had received during the violent adminiſtrations of William and of Rufus 23; and, if charters of corporation and community

Præterea volumus et concedimus quod OMNES ALIAE CIVITATES *et* BURGI *et* VILLAE *et* PORTUS *habeant* OMNES LIBERTATES, *et* LIBERAS CONSUETUDINES SUAS. *Magna charta ap. Blackſtone, Law Tracts, vol. III. p.* 21.

23. They had ſuffered conſiderably, even from the time of the Confeſſor to that of Domeſday-book. Authors ought therefore to be

nity were granted ſeldom during the reigns of Henry I. and of Stephen, they were frequent under Henry II. Richard I. king John, and Henry III. During the ſovereignty, accordingly, of the laſt, and during that of Edward I. the acquiſitions ſecured by the Commons appeared ſo conſiderable, that their aſſembling in parliament became a matter of greater regularity, and they roſe to their ancient importance from the diſorder into which they had been thrown during agitated and turbulent times.

The 49th year of Henry III. and the 23d year of Edward I. which ſo many writers conſider as the dates of the eſtabliſhment of the Commons, were, of conſequence, nothing more than memorable epochs in their hiſtory 24.

Under

be cautious in reaſoning back from that monument to the Saxon period. It is a pity, that the ſurvey of the kingdom taken by Alfred did not yet remain. The compariſon of it with that of William would lead to very curious diſcoveries.

24. The firſt ſummons of knights extant on record is ſuppoſed to be in the 49th of Henry III. But this, though it were true, does not prove that knights were not known till that time. The writ does not ſay ſo; nor can it be gathered from it, that *knights of the ſhire* were then *newly* eſtabliſhed. If there remained, indeed, an uniform ſeries of records from the earlieſt times, in which there was no mention of *knights* till the age of Henry III. there might thence ariſe a ſtrong argument againſt their antiquity. But this is not the caſe; and it happens, that in the 15th year of king John, there is a writ to the ſheriff to ſummon FOUR *knights of the county;*

Under Edward I. the conſtitution received a ſtability to which it was no leſs indebted to his military than his civil capacity.

county; 15. *Jo. Rs. rot. clauſ. pt.* 2. *m.* 7. *dorſo.* 4 *diſcretos milites, de comitatu ſuo, ad loquendum nobiſcum.* There is alſo ſimilar evidence, that in the 32d and 42d years of Henry III. *knights* made their appearance in parliament. *Whitelocke, Notes, vol. I.* 438. *vol. II.* 120. In the cloſe roll, alſo, of the 38th year of Henry III. there is extant a writ of ſummons directed to the ſheriffs of Bedfordſhire and Buckinghamſhire, requiring TWO *knights* to be ſent for each of theſe counties. *Lyttleton, Hiſt. Henry II. notes to the 2d book,* 70. 79. In ancient times, it was uſual to ſummon ſometimes FOUR *knights*, ſometimes THREE, ſometimes TWO, and even ſometimes ONE *knight*. But from the reigh of Edward III. it has been the conſtant practice for the ſheriff to return TWO *knights* for each county. *Whitelocke, vol. I.* 439.

The firſt ſummons directed to the ſheriff for the election of *citizens* and *burgeſſes*, is ſuppoſed to be in the 23d of Edward I. But in the ſixth year of king John, ſays Whitelocke, there is extant on record a writ to the ſheriff, which mentions "Biſhops, "earls, barons, and *all our faithful people in England;* by whoſe "aſſent, lawes were then made." 6. *Jo. regis, rot. clauſ. m.* 3. *dors. et rot. pat. m.* 2 *Aſſenſu. archiepiſ. &c. et omnium fidelium noſtrorum Angliæ. Notes on the king's writ, vol. II p.* 120 An ordinance in this year of king John, directed *to all the ſheriffs* in England, is mentioned from the records by Sir Robert Cotton, and has theſe words: *Proviſum eſt* ASSENSU *Archiepiſcoporum, comitum, baronum, et* OMNIUM FIDELIUM NOSTRORUM ANGLIAE. *Cotton. poſth. p.* 15.

In the *conventio inter regem Johannem et barones* the people are ſtated as parties; a circumſtance which would not have happened if they had not been repreſented. *Hæc eſt conventio facta inter dominum Johannem regem Angliæ ex una parte, et Robertum filium Walteri*

capacity. The wars and expeditions in which he engaged, involved him in immenſe expence; and calling for ſupplies, rendered him particularly attentive to the people. The feudal

teri Mareſcallum, &c. ET LIBEROS HOMINES TOTIUS REGNI *ex altera parte.* Blackſtone's Edition of the charters, ap. Law Tracts, vol. II. p. 39 40. And what confirms this notion is, that we find the *mayor of London* and the *conſtable of Cheſter* in the liſt of thoſe who were choſen conſervators of the public liberties in conſequence of the great charter. Other proofs, likeways, of the antiquity of the commons are to be found in the great charters. See Lyttleton, Hiſt. Henry II. Notes to the 2d book, p. 71.

It is alſo worthy of notice, that the 25th of Edward I. which confirms the great charter, obſerves, that it was made by the *common aſſent of all the realm:* And the 15th of Edward III. obſerves, that it was made *par le roy, ſos piers, et la communalte de la terre.*

Nor muſt it be omitted, that the 5th of Richard II. has this remarkable paſſage: *The king doth will and command, and it is aſſented in the parliament, by the prelates, lords and* COMMONS, *that all and ſingular perſons and commonalties, which from henceforth ſhall have the ſummons of the parliament, ſhall come from henceforth to the parliaments in the manner as they are bound to do, and have been accuſtomed within the realm of England* OF OLD TIMES. *And if any perſon of the ſame realm, which from henceforth ſhall have the ſaid ſummons (be he archbiſhop, biſhop, abbot, prior, duke, earl, baron, banneret,* KNIGHT *of the ſhire,* CITIZEN *of city,* BURGESS *of borough, or other ſingular perſon, or commonalty) do abſent himſelf, and come not at the ſaid ſummons (except he may reaſonably and honeſtly excuſe him to our lord the king) he ſhall be amerced, and otherwiſe puniſhed, according as* OF OLD TIMES *hath been uſed to be done within the ſaid realm in the ſaid caſe. And if any ſheriff of the realm be from henceforth*

feudal force of the kingdom could not be employed by him with efficacy. In the decline of the Gothic ſyſtem, the nobles were not ſufficiently in ſubjection to the prince; and their ſervice was limited to a narrow period. In the reign, indeed, of Henry II. a pecuniary payment had been

henceforth negligent in making his returns of writs of the parliament; or that he leave out of the ſaid returns ANY CITIES OR BOROUGH WHICH BE BOUND AND OF OLD TIME WERE WONT TO COME TO THE PARLIAMENT, *he ſhall be amerced, or otherwiſe puniſhed in the manner as was accuſtomed to be done in the ſaid caſe* in times paſt. *Stat. 2. cap. 4.*

The expreſſion "of old time," ſo often uſed here, muſt doubtleſs carry us farther back than the 23d of Edward I. or even the 49th of Henry III. The ſpace of two or even three reigns does not make a period of antiquity. We do not ſay, that the acceſſion of George I. was in *ancient times.*

I know well, that the expreſſions *commonalty, communitas regni, baronagium Angliæ, magnates, nobiles, proceres, &c.* have been conſidered as ſolely applicable to barons and tenants *in capite.* But one muſt beware of giving credit to this opinion. The great charter of king John bears to have been made *per regem, barones et liberos homines totius regni;* a certain proof that it was not made by the king and the barons only; yet Henry III. ſpeaking of this parliament, calls it *baronagium Angliæ.* The *magnates* and *proceres* are ſaid to have made the ſtatute of Mortmain; but it is well known, that the parliament which gave authority to this act conſiſted of king, lords and *Commons.* In the 35th of Edward I. the expreſſion *cum comitibus, baronibus, nobilibus proceribus, ac communetatibus,* evidently refers to KNIGHTS, CITIZENS and BURGESSES: And in the 14th of Edward III. *commonalty* and *Commons* are uſed as ſynonymous. See farther, *Whitelocke, vol. II. ch.* 81. *Coke, 2d Inſt.*

been ſubſtituted in the place of the perſonal attendance of the military vaſſal; and the cuſtom had prevailed of hiring ſoldiers of fortune. But, amidſt the prevalence of private and mercenary views, the generous principles which had given ſolidity to the feudal fabric 25 having totally decayed, and the holding by a military tenure having ceaſed to be conſidered as an honour; vaſſals thought of eluding the duties to which they were bound by their poſſeſſions, and granting them away in fictitious conveyances, received them back under the burden of eluſory or civil donations. It even grew to be uſual among tenants to refuſe the pecuniary payments, or the *ſcutages* to which they were liable:

Inſt. 583. *Petyt, Rights of the Commons. Atkyns, on the power and juriſdiction of parliament.*

Mr. Hume, I am ſenſible, ſtrenuouſly aſſerts the late origin of the Commons; and one would almoſt imagine, that his hiſtory of England had been written to prove it. His reaſonings, however, on conſtitutional points, do not appear to me to be always deciſive; and it is with pain I obſerve the reſpect which this great man has paid to the opinions of Dr. Brady; a writer who is known to have diſgraced excellent talents, by pleading the cauſe of a faction, and giving a verniſh to tyranny.

The brevity which was neceſſary to this tract, has permitted me rather to hint at, than to treat the antiquity of the Commons. In a work which I hope one day to lay before the public, I ſhall have an opportunity of entering into it at greater length.

25. Hiſt. Diſſert. concerning the antiq. of the Engl. conſtitut. part 2.

ble: They denied the number of their fees; they alledged that the charge demanded of them was not juſtified by their charters; and, while the prince was ready to march againſt an enemy, it was not convenient to look into records and regiſters. The ſovereign deprived of his ſervice, and defrauded of his revenue, and under the neceſſity of levying a military force, had no reſource ſo ſecure or abundant as the generoſity of the people 26.

The admirable improvements with which Edward enriched the laws, and facilitated the preſervation of domeſtic peace and order, contributed alſo with the greateſt efficacy to advance and ſecure the liberties of England. He eſtabliſhed the limits of the different courts; he gave a check to the inſolence and encroachments of the clergy; he abrogated all inconvenient and dangerous uſages; and the

26. *Madox, hiſt. of the Excheq. Bar. Angl.* The granting of ſupplies to the ſovereign, naturally ſuggeſted to the people the petitioning for redreſs when under the preſſure of any grievance; and the crown, where it expected much, would not naturally exerciſe a rigorous ſeverity.

The term *petitioners* indeed, has, by ſome authors, been conſidered as reproachful to the *Commons*; but how a petition, as the ſpring of a law, could have meanneſs in it, is inconceivable. Even in the free age of Charlemagne, this mode of application was employed. *Baluz. capit. reg. Franc. tom.* 1. The behaving with reverence to the ſovereign is very different from acting with ſervility. And as to the petitioning againſt grievances, it is to be remembered, that reſpectful requiſitions of ancient and conſtitutional privileges, which had ſuffered invaſion, are not to be conſidered as mean ſolicitations for acts of favour.

the great charter, and the charter of the foreſt, received from him the moſt ample ſettlement[27]. The ſagacity of his precautions and policy procured to him moſt deſervedly the name of the *Engliſh Juſtinian*; and it may be mentioned as a convincing proof, both of his genius, and of his

27. *Conf. Cart. an.* 25. *Ed. I.* It is ſingular, that even after the times of Edward I. ſome writers will not allow, that the Commons were any eſſential branch of the legiſlature; yet the writ of ſummons expreſſes in ſtrong terms their right of aſſent: *Ad audiendum et faciendum et conſentiendum*; and a multitude of examples may be produced of their actually conſulting and determining about peace and war and other important matters of ſtate.

There is evidence that Edward I. called a parliament, and conſulted with the Lords and *Commons* about the conqueſt of Wales, and that on receiving information that the French King intended to invade ſome of his dominions in France, he ſummoned a parliament *ad tractand. ordinand. et faciend. cum prælatis, proceribus et aliis incolis regni quibuſlibet, hujuſmodi periculis et excogitatis malis ſit objurand.* Inſerting in the writ theſe memorable words, *Lex juſtiſſima, provida circumſpectione ſtabilita:* QUOD OMNES TANGET, AB OMNIBUS APPROBETUR.

Edward II. conſulted with his PEOPLE in his firſt year *pro ſolemnitate ſponſalium et coronationes*; and in his ſixth year he conſulted them, *ſuper diverſis negotiis ſtatum regni et expeditionem* GUERRAE SCOTIAE *ſpecialiter tangentibus* *.

Edward

* In his hiſtory of this prince, Mr. Hume has the following very ſtrange aſſertion: "The Commons, though now an eſtate in parliament, were yet "of ſo little conſideration, *that their aſſent was never demanded.*" Vol. II. p. 139.

his having ſtudied the welfare of his people, that, to the form into which he modelled the common law, as to the admi-

Edward III. ſummoned the peers and *Commons* in his firſt year to conſult them, Whether they would reſolve on peace or war with the Scottiſh king. In his ſixth year, he aſſembled the lords and *Commons*, and required their advice, Whether he ſhould undertake an expedition to the Holy Land. The lords and *Commons*, conſulted accordingly; and while they applauded his religious and princely forwardneſs to the holy enterprize, adviſed a delay of it for that ſeaſon. In his thirteenth year, the parliament aſſembled *aviſamento prælatorum, procerum, necnon* COMMUNITATIS to adviſe *de expeditione* GUERRAE *in partibus tranſmarinis;* and ordinances were made for proviſion of ſhips, arraying of men for the marches, and defence of the iſle of Jerſey. In his fortieth year, the Pope demanding the tribute of king John, the parliament aſſembled, where, after conſultation apart, the prelates, lords and *Commons* adviſe the refuſal of it, *although it be by the dint of the ſword.*

Richard II. in the firſt year of his reign, adviſed with the peers and *Commons*, How he ſhould beſt reſiſt his enemies? In the ſecond year, he conſulted his *people* how to withſtand the Scots; who had combined againſt him with France. In the ſixth year, he conſulted the parliament about the defence of the borders; his poſſeſſions beyond ſea, *Ireland* and *Gaſcoyne*, his ſubjects in *Portugal*, and ſafe keeping of the ſeas; and whether he ſhould proceed by treaty or alliance, or the duke of Lancaſter by force? The lords approved the duke's intention for Portugal; and the *Commons* adviſed, that Thomas biſhop of Norwich, having the Pope's *croiceris*, ſhould invade France. In his fourteenth year, this prince adviſed with the lords and *Commons* for the war with Scotland, and would not, without their counſels, conclude a final peace with France. And the year enſuing the *Commons* intereſted the king

adminiſtration of common juſtice, the wiſdom of ſucceeding

king to uſe moderation in the law of proviſions, and propoſed that the duke of Aquitaine ſhould be employed to negotiate the peace with France.

With regard to the power of the *Commons* as to *judicature*, in the times of which we ſpeak, there are not wanting deciſive proofs. In the reign of Edward II. the peers and *Commons* gave conſent and judgment to the revocation and reverſement of the ſentence of baniſhment of the two Spencers*. In the firſt year of Edward III. when *Elizabeth* the widow of *Sir John de Burgo* complained in parliament, that Hugh Spencer the younger, Robert Baldock and William Cliffe his inſtruments, had by dureſs forced her to make a writing to the king, in conſequence of which ſhe was deſpoiled of her inheritance, ſentence was given for her by the prelates, lords and *Commons*. In the 4th year of Edward III. it appears by a letter to the pope, that to the ſentence given againſt the earl of Kent, the *Commons* were parties as well as the peers; for the king directed their proceedings in theſe words: *Comitibus, magnatibus, baronibus, et aliis de* COMMUNITATE *dicti regni ad parliamentum illud congregatis injunximus, ut ſuper his diſcernerent et* JUDICARENT *quod rationi et juſtiniæ conveniret.* When in the firſt year of Richard II. William Weſton and John Jennings were arraigned in parliament for ſurrendering certain forts to the king; the *Commons* were parties to the ſentence againſt them, as appears from a writing annexed to the record. In the firſt year of Henry IV. although the *Commons* refer by proteſtation, the pronouncing the ſentence of depoſition againſt King Richard II.

to

* The ſhare the *Commons* had in this act, Sir Robert Cotton authenticates from the parliament rolls: *Cottoni poſthuma, p.* 348. Yet Mr. Hume, in the moſt poſitive terms, denies that the *Commons* had any concern in it. Vol. 2. p. 140.

ceeding times has not been able to add any conſiderable improvements 28.

The crown of Edward I. but not his talents, deſcended to Edward II. The indolence, however, and the incapacity

to the lords, yet they were equally intereſted in it, as is evident from the record; for there were made proctors or commiſſioners for the whole parliament, one biſhop, one earl, one abbot, one baronet, and two knights. "And to infer, ſays a learned and accurate author*, that becauſe the lords pronounced the ſentence, "the point of judgment ſhould be only theirs, were as abſurd as "to conclude that no authority was left in any other commiſſioner "of *oyer and terminer* than in the perſon of that man ſolely that "ſpeaketh the ſentence." In the ſecond year of Henry V. the petition of the Commons imported no leſs than a RIGHT *to act and aſſent to all things in parliament;* and the king allowed that they poſſeſſed this right.

Theſe examples of the importance of the people are ſtriking; and they are ſupported by the authority of the parliament-rolls, or by records above exception. The curious reader may ſee them, and other proofs to the ſame purpoſe, in the poſthumous pieces of Sir Robert Cotton.

28. *Hale, hiſt. of the com. law, ch. vii.* It has been ſometimes inſiſted upon, that much improvement was brought to England by the canon and civil laws. I cannot, however, but imagine, that theſe laws have, on the whole, been rather attended with diſadvantage. For tyrannical maxims do not ſuit a limited government. They may have aſſiſted, indeed, the invention, and extended the views of ſome lawyers; but they have filled the heads of more with illiberal prejudices.

† Sir Robert Cotton.

city of the laſt prince, joined to his abſurd paſſion for favourites, though they rendered his reign tumultuous and unhappy, were no leſs favourable to the dignity of parliament, and the power of the people, than the excellent adminiſtration of Edward III. and the neceſſities to which he was ſubjected by his ambition and his proweſs. A weak prince may loſe the prerogatives tranſmitted to him; but will never be the founder of a deſpotiſm. A high ſpirited monarch, dependent for reſources on his people, may carry deſtruction and ruin into the country of an enemy, but will not eaſily be induced to attack the liberty and the proſperity of his own kingdom.

The ſons of Edward III. had contributed, while he lived, to his grandeur, and that of the nation; but no ſooner was he laid in his grave, than they excited commotions. The ambition of their poſterity was ſtill more peſtilent and fatal. The wars between the Houſes of York and Lancaſter deluged England with blood. The paſſions of men were driven into rage and phrenzy; and in the maſſacres, rather than the battles that enſued, conqueſt or death ſeemed the only alternative. But while we turn with ſorrow from this bloody period of our ſtory, our ſympathy is ſoftened by the recollection, that the contending princes brought acceſſions to liberty, by adding to the weight of the Commons. The favour and countenance of the people were anxiouſly ſolicited by both factions; and their influence failed not to grow, while the means of extending

extending it were offered, and while they were courted to ſeize them 29.

The nation, when ſatiated with the calamities of civil war, thought of uniting the claims of the two hoſtile families. Henry VII. the heir of the Houſe of Lancaſter, was married to Elizabeth, the heireſs of the Houſe of York. This prince affected to be profound, and he has obtained that character. But the condition of Europe at the time in which he lived, and the ſituation in which he found himſelf, pointed out to him his ſtrain of conduct. He was more myſterious than wiſe; more prudent than enterpriſing; and more a ſlave to avarice than ambition. Without having intended it, he placed the grandeur of the Commons on the moſt ſolid foundation. In the liberty which he granted to the nobility of breaking their entails, he ſaw only the degradation of that order. The civil wars had involved them in great expence; and the growing commerce and refinement of the times, expoſed them to ſtill greater. Their princely poſſeſſions flowed from them to give dignity to the people 30.

29. The reader, who is deſirous of ſeeing proofs of the conſideration of the people during the wars between the Houſes of York and Lancaſter, may conſult Cotton's abridgment of the records; and Bacon on the laws and government of England. Part II.

30. In the year 1546, there were 126 boroughs that returned members to parliament; and the greateſt number of theſe were wealthy

Henry VIII. had no certain character, and was actuated by no fixed and determined maxims. He had not the ability to form, nor the firmneſs to put into execution, a deliberate ſcheme to overturn the liberties of his country. With leſs capacity than his anceſtor, his reign was more ſplendid; and, with a more imperious temper, he had the art or the felicity to preſerve the affection of his ſubjects. The father removed the pillar which ſupported the power of the nobles: The ſon gave a mortal blow to the influence of the clergy. In the humiliation of both, the Commons found a matter of triumph. The Reformation, though it interrupted the progreſs of literature, was yet highly conducive to civil liberty. The church in loſing an authority which it had never merited, and which it had often abuſed, ſunk into a dependence on government. The ſupremacy returned to the ſovereign to whom it originally belonged, and with whom it ought conſtantly to have remained. The viſitation of the monaſteries diſcovered more than the inventions of a pious fraud; vices and

wealthy and populous. *Brown Willis, notit. parliam. vol. I.* In the reign of Edward VI. 23 new boroughs were ſummoned to ſend burgeſſes to parliament. Philip and Mary added 13 more, Elizabeth 30, James the 2 univerſities and 12 boroughs, Cha. I. 8 boroughs, and II. the county of Durham and 2 boroughs. *Ellys on temporal liberty.* Antiently the king might incorporate any town, and enable it to ſend burgeſſes to parliament; but this privilege remains not at preſent with the crown. If the king was now to venture on the creation of a parliamentary borough, it would reſt with the houſe of commons whether they would receive the members.

and abuſes which cannot be deſcribed, without conveying to the mind the impreſſion of whatever is moſt wicked and moſt diſhonourable: Their ſuppreſſion gave encouragement to induſtry and to the arts; and their wealth, diffuſed in a thouſand channels, circulated through the kingdom.

The Reformation advanced under Edward VI. but it was deſtined that this prince ſhould only make his appearance on the ſtage of public life, and give the hope of an able adminiſtration. The ſway of Mary was a paroxyſm of religious madneſs. She knew not, that when the individuals of a kingdom have agreed to adopt a new religion, it is the duty of the ſovereign to give a ſanction to it. The reformed were about to experience whatever cruelty the extremity of a miſtaken zeal can inflict. But the fires lighted by Gardiner, Bonner, and ſuch abominable men, brought no converts to popery. The dread of endangering the ſucceſſion of Elizabeth prevented the parliament from giving a check to the obſtinate malignity and the ſanguinary rage of this unworthy queen; or, perhaps, the nation had ſcarcely recovered the aſtoniſhment into which it was thrown by the atrocity of her deeds, when, in the ſixth year of her reign, ſuperſtition, peeviſhneſs, and the moſt ſelfiſh and unhappy paſſions, put an end to her life.

Elizabeth, who had learned wiſdom from misfortune, attained the ſummit of political glory. The perilous condi-

tion of affairs, on her commencing to reign, required ſingular moderation and abiſity, and ſhe exerted them. A ſagacity, almoſt incapable of miſtake, directed all her operations 31. England grew in commerce and advantages, while the reſt of Europe was agitated with contentions, and debaſed with the tyranny of power. Her jealouſy of prerogative was corrected by her attachment to the felicity of her people; and the popularity with which ſhe reigned is the fulleſt proof that ſhe preſerved inviolated all the barriers of liberty 32. The reformation which the folly of her predeceſſor had interrupted, was compleated by her prudence.

This

31. " As for her government, ſays a great authority, I aſſure " myſelf I ſhall not exceed, if I do affirm, that this part of the " iſland never had 45 years of better times; and yet not all " through the calmneſs of the ſeaſon, but through the wiſdom " of her regiment." *Lord Bacon.*

32. " She loved not to be tied, but would be knit unto her " people. Of 13 parliaments called during her reign, not one " became abortive by unkindneſs; and yet not any one of them " paſſed without ſubſidy granted by the people, but one wherein " none was deſired. And ſometimes the aid was ſo liberal, that " ſhe refuſed the one half, and thanked the people for the rem- " nant; a courteſy that rang loud abroad, to the ſhame of other " princes. She never altered, continued, repealed, nor explain- " ed any law, otherwiſe than by act of parliament, whereof there " are multitudes of examples in the ſtatutes of her reign." *Nat. Bacon, Diſcourſe on the laws and government of England, part 2.*

I do

This accompliſhed princeſs was ſucceeded by James VI. of Scotland. He ſubſtituted, in the place of ability, the affectation of it. The Engliſh nation received him with marks of reſpect which they were not to continue long. With high notions of kingly dignity, all his actions tended to degrade it; and, while his littleneſs rendered him contemptible at home, he became an object of ridicule abroad, from his ignorance of foreign politics. Careleſs in the choice of his miniſters, and ſupremely conceited of his own wiſdom, his reign brought no glory to the crown.

The great improvement, which, about this period, diſplayed itſelf in the national manners, diffuſed among all ranks of men very enlarged ideas concerning the nature and principles of civil government. The arts had been cultivated with uncommon ſucceſs. Diſcoveries had been made in the moſt diſtant regions of the globe. Commerce had brought great acceſſions of wealth. The balance of property had turned with no equivocal direction to the ſide of the people.

It

I do not mean to ſay, that Elizabeth, and the princes who preceded her, never acted againſt the ſpirit of our government. Her reign, and thoſe of many of her predeceſſors, were doubtleſs ſtained with bold exertions of authority. But bold exertions of authority muſt not be interpreted to infer deſpotiſm in our government. We muſt ſeparate the perſonal qualities of princes, and the principles of the conſtitution. The government of England, and the adminiſtrations of its chief magiſtrates, are very different things.

It was not an age for faſtidious and tyrannical maxims. The Commons knew all their ſtrength, and were determined to employ it. The prince endeavoured in vain to impreſs them with his exorbitant notions of regal authority. Every complaint and grievance of the ſubject were inquired into; every ſuſpicious and inclement act of prerogative was oppoſed. The doctrines of the divine right of kings, and of paſſive obedience, were now firſt heard of, and alarmed and aſtoniſhed the nation. Pretenſions to power, deſtructive of the natural and inherent privileges of humanity, and inconſiſtent with every principle of common ſenſe, were aſſerted from the pulpit, were claimed by the ſovereign. The extravagance of James awakened the thunder which was to burſt on the head of his ſucceſſor.

Charles I. had imbibed the ſame lofty conceptions of kingly power; and his character was marked by the ſame incapacity for real buſineſs. His ſituation required inſinuation and addreſs; but he affected the utmoſt ſtatelineſs of demeanor. He diſguſted the Commons; he inſulted the people. To the exerciſe of his authority, he fancied there was no limitation. Inflamed with oppoſition, he preſumed to attack whatever was moſt ſacred and moſt valuable among men. The imprudence of Buckingham had not ſoftened his obſtinacy: His Queen was indiſcreet, and he confided in her. The violent councils of Strafford precipitated his own and the ruin of his maſter. The religious foppery of Laud completed what the incapacity of James had begun:

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It was the cement of union between the friends of liberty and the ſect of the Puritans. The people beheld with a fixed and a general indignation the inſult and the violence which were offered to the majeſty of their laws, and to their conſtitution. The flames of civil diſcord were kindled. England was torn during ſix years with political and religious fury. The unfortunate Charles atoned at length by his death the diſorders he had occaſioned. The delegates of the people pronounced him guilty of miſgovernment and breach of truſt. "The pomp, ſays an elo-"quent hiſtorian, the dignity, the ceremony of this tranſ-"action, correſponded to the greateſt conception that is "ſuggeſted in the whole annals of human kind 33.

Cromwel,

33. *Hume, Hiſt. of England, vol. V. p.* 462. This hiſtorian, the moſt accompliſhed, perhaps, who has written in modern times, has attempted to vindicate both James and Charles; but he has done nothing more than to produce evidence to ſhew, that in ſome reſpects they acted from precedents of adminiſtration in former princes; and this, if taken even in the fulleſt extent, is inſufficient to juſtify them. Charles, however, it will be allowed, exceeded every violation of liberty, of which there had been any example; and when he had conſented to reduce the exorbitancy of the regal power, his conduct created a ſuſpicion of his ſincerity. But on the ſuppoſition that he did not advance his authority beyond the practice of former times, he is not therefore to be vindicated. It is no exculpation of a crime in one individual, that it has been committed by others. The advantages of a free government belonged to the people of England; and they were the proper judges when

Cromwel, the immediate cauſe of the death of Charles, and of thoſe circumſtances of cenſure which accompanied it, aſtoniſhed at the height, to which, in the courſe of the civil wars, his ambition had carried him, was induced to aſpire ſtill higher. His genius was great, his fortune greater. On the abolition of monarchy, he introduced into England a military deſpotiſm, under the appellation of a common-wealth 34. From an inferior rank, he had riſen gradually to direct the affairs of a powerful nation. Though irregular in his politics, the vigour of his conduct brought ſignal glory to his councils and his arms. But the fabric he had built was ill-contrived and ill-cemented; its parts were diſproportioned; and it reſted on no

when to enforce their privileges againſt an invader. They might pardon in one ſovereign what they would puniſh in another. They might overlook in Elizabeth what they did not wiſh to excuſe in Charles. The doctrine of reſiſtance is delicate. In a free conſtitution, like that of which we ſpeak, the prince and the people will often fall into ſituations where they ſeem to encroach, or actually do ſo, on the rights of one another. But it is never on ſlight grounds that the people will be prevailed upon to take arms againſt their chief magiſtrate. After all, had England been an abſolute monarchy, Was it thence proper and juſt that it ſhould remain in that ſituation? There are rights which it is impoſſible that men can either loſe or forfeit. No authority and no precedent, no uſage and no law, can give a ſanction to tyranny.

34. Lord Clarendon applies to him, with great propriety, what was ſaid of Cinna, *auſum eum, quæ nemo auderet bonus; perfeciſſe, quæ a nullo, niſi fortiſſimo, perfici poſſent.*

no ſolid foundation. It began to totter during his own life. His ſon Richard had none of the talents of an uſurper. The minds of the people united in an anxious wiſh for the re-eſtabliſhment of the ancient conſtitution; and general Monke acquired the honour of the peerage, and the fame of uncommon political ſagacity, for forwarding an event, which it was impoſſible to prevent.

Charles II. never forgave the people of England for the misfortunes he himſelf had ſuffered, nor for thoſe of his Houſe. This monarch had quickneſs of parts, but poſſeſſed not that diſcernment which ſees into the future. He entered without reflection into ſchemes and projects, and renounced them with the ſame precipitation. Though an enemy to the conſtitution of his country, and though in the intereſt of France, he was not able to produce any laſting diſadvantage to the kingdom. His reign, though tumultuous, was not unfavourable to liberty. The total abolition of the military tenures and their appendages, which had place during his ſovereignty, was a moſt important acquiſition to the people: It relieved their eſtates from every ſource of legal oppreſſion. The *habeas corpus* act, which was ſome years poſterior to it, offered the firmeſt ſecurity to their perſons. It produces in a court of juſtice the body of every priſoner; it makes known the cauſe of every commitment; and, if an individual has ſuffered confinement in oppoſition to the law, though at the command of the king in council, he is reſtored to his liberty,

berty, and has a claim of compenſation for the loſs and the indignity his affairs and his honour have ſuſtained.

The clamour againſt popery was loud and violent during the long adminiſtration of Charles II. and yet the crown was permitted to paſs to the Duke of York. This confidence, ſo honourable to the people, was abuſed by the ſovereign. James II. had the zeal of a monk, not the virtue and the talents of a great king. His bigotry and his luſt of power made him perpetrate the moſt atrocious and the moſt inſolent acts. Violating equally civil and religious liberty, his ſubjects deprived him of a throne of which he was unworthy.

In ſettling the crown on the prince and princeſs of Orange, the wiſeſt precautions were taken, that the religion, the laws, and the liberties of England ſhould never more be in danger of being ſubverted. The limits of the prerogative were defined; the extent of the freedom of the people was aſcertained; and the doctrine of reſiſting the prince, when he ſhould preſume to encroach on the rights of the ſubject, was explained and illuſtrated 35.

From the Saxon conqueſt, during a long ſucceſſion of ages, this fortunate iſland has never degenerated from liberty. In the moſt inclement periods of its hiſtory, it deſpaired not of independence. It has conſtantly foſtered that

35. Bill of rights, toleration act, act of ſettlement.

that indignant ſpirit which diſdains all ſubjection to an arbitrary ſway. The conſtitution, proſpering under the ſhocks it received, fixed itſelf at the higheſt point of liberty that is compatible with government. May it continue its purity and vigour! and give felicity and greatneſs to the moſt diſtant times!

March 1775.

LECTURES

ON THE

LAWS OF ENGLAND.

LECTURE I.

The intention and purpoſes of political ſociety—Cuſtoms and manners govern men before the enactment of poſitive Laws—Arts and property the ſources of legiſlation—Peculiarities attending the inſtitutions of Lycurgus and thoſe of Moſes—In the infancy of a ſtate, laws are few and plain—In times of civility and refinement, they are numerous and complicated—The liberty of the people, a great cauſe of the multiplicity of laws—The difficulty of the ſtudy of the Engliſh law—The methods which have been followed in the ſtudy of it.

SINCE every political ſociety was originally framed for the general benefit of the ſeveral individuals of which it was compoſed, in order that, ſupported by the united ſtrength of the whole community, each perſon might have that ſecurity in his life, his liberty, his property, which, unaſſiſted in a ſtate of nature, he could not of himſelf attain unto; and that, inſtructed by the joint counſels and wiſdom of the whole body, he might ſo direct his actions, as to promote the public welfare, with which his own ſafely and intereſt are neceſſarily connected; it follows, that, in ſuch a ſtate, every man muſt, even for his own ſake, in many things, ſacrifice his private judgment, and his natural liberty of action, to the will of that community

to which he belongs; which will, acting uniformly for the ſame purpoſes, cannot fail of producing a number of fixed rules and regulations, to ſerve as directions to the ſubjects, in ſuch caſes as are common, and frequently occur.

Accordingly, we find, there never was a ſtate or nation, even but one degree removed from barbarity, that ſubſiſted without ſome general cuſtoms, at leaſt, which ſupplied the place of poſitive laws, by which the conduct of the ſeveral members of the ſociety was to be governed, and for the breach of which they were liable to puniſhment; and in ſuch a ſubmiſſion the very eſſence of political freedom conſiſts. For, as M. Monteſquieu very juſtly obſerves, the liberty of man in a ſocial ſtate, different from that in a ſtate of nature, conſiſteth not in a power of acting in all things, according to his own judgment, but in acting according thereto, in ſubſervience to the will of the public, in being free to do all things the law prohibits not, and to omit all things the law doth not enjoin †.

Hence, in all ſuch infant ſtates, the greateſt reſpect is paid, and the higheſt influence allowed to thoſe, who, either by their age and experience, or, by their application and labour, have arrived at a proficiency in the knowledge of the cuſtoms and practices prevailing in their own and neighbouring nations: *Qui mores hominum multorum vidit et urbes*, is the great eulogium of the moſt accompliſhed hero of the heroic ages.

It muſt be allowed, indeed, that, in ſocieties ſo ſmall that their members are, in general, contented with little more than the bare neceſſaries of nature, a few rules will be ſufficient; and every man of a tolerable capacity will, with a reaſonable degree of obſervation, be, in ſome mea-

† L'Eſprit des Loix, Liv. xi. ch. 3.

ſure

ſure, qualified to be his own lawyer. But when it ſhall happen that arts are not only introduced, but become common among any people, when the comforts and conveniencies of life are, in the public opinion, eſteemed neceſſaries; when the induſtry of ſome, and the negligence of others, have produced a remarkable inequality in the goods of fortune; when riches hath brought forth her offſpring, inſolence and oppreſſion, and when envy and avarice inflame the breaſts of the indigent, it will be abſolutely neceſſary to lay a continual reſtraint on ſuch violent paſſions, ready at every inſtant to deſtroy the peace of ſociety, and to tear it into pieces, and, for that purpoſe, to form a great number of regulations, to curb thoſe who have created to themſelves imaginary wants, and who no longer regulate their conduct by the plain dictates of rude and ſimple nature. And as the condition of ſuch a nation muſt be perpetually changing, as new arts and gratifications will be continually invented, as the increaſe of commerce will every day open a proſpect of more various acquiſitions, and inſenſibly introduce a general change of manners in the people; and, above all, as the wits of men, checked in their darling purſuits, will ever be at work to diſcover methods of eluding thoſe laws which they dare not openly infringe, there muſt enſue a conſtant alteration and variation of the rules already in being, and a continual addition of new ones to anſwer new and unforeſeen emergencies. The laws, therefore, of a nation ſo circumſtanced, muſt increaſe to ſuch a number, and conſiſt of ſo great a variety of particulars, as to render it impoſſible for the generality of the ſubjects to be maſters of them, and will oblige them to reſort to thoſe whoſe eaſy circumſtances and leiſure have enabled them thoroughly to comprehend and underſtand them; and among ſuch a people there muſt be *lawyers*, although, perhaps, not formed into a diſtinct and ſeparate profeſſion, or known by that appellation.

Great, undoubtedly, are the inconveniencies which attend a multiplicity of laws, and very hard it ſeems, that all men ſhould be obliged to obey a rule which it is confeſſed the majority are incapable of perfectly knowing; but ſuch is the natural and neceſſary courſe of things. If men will not be contented to live in a ſtate next to abſolute barbarity, if they will enjoy the conveniencies as well as the neceſſaries of life, if they will be ſecured againſt the oppreſſion and fraud of their fellow ſubjects, as well as againſt the violence of ſtrangers, they muſt ſubmit to and abide by the conſequences. And ſo ſenſible of this neceſſity was the great Spartan legiſlator, that when he reſolved his ſtate ſhould admit of no addition to, or alteration of his regulations, he wiſely ſtopped up the ſources from which new laws ſpring. Commerce, and its inſtrument, money, were prohibited; all arts, except thoſe abſolutely neceſſary, were interdicted, and the people, by conſtantly living and eating in public, were not only accuſtomed, but neceſſitated to content themſelves with what ſimple nature requires. By theſe means (and by theſe only, or by others ſimilar to theſe, could it be accompliſhed) Lycurgus gave a firmneſs and ſtability to his republic, which continued for ſeveral hundred years, until conqueſt introduced wealth, and its neceſſary attendants, which ſoon eat out the vitals of that ſingular conſtitution †.

The law of Moſes, likewiſe, was invariable, and admitted of no additions or alterations; and as, from the peculiar circumſtances of the country, and its ſituation, there was no danger of an accumulation of wealth from foreign commerce, ſo were the domeſtic regulations inimitably calculated to prevent a great inequality of circumſtances, and to

† Plut. Vit. Lycurg.

oblige

oblige the nation in general to a plain and ſimple life. All uſury among the Iſraelites was prohibited, the lands were alienable no longer than to the year of jubilee, at which time they returned free to the original proprietor or his heirs; and, by the invariable rules of deſcent, and the continual dividing of eſtates among all the males in equal degree, every man was proprietor of ſome ſmall patrimony, and conſequently obliged to live in a frugal and laborious manner†. Athens, on the contrary, the moſt commercial and the richeſt city of Greece, abounded, above all others, in a multiplicity of laws, and thoſe, for the cauſes already mentioned, perpetually varying and changing. Rome, while it continued a mere military ſtate, was contented with a few, and thoſe ſuch as were ſhort and plain; but when, by the conqueſt of Carthage, of Greece, and of Aſia, floods of wealth were poured into Italy, the neceſſary conſequences ſoon followed. New laws were continually made, which, being as continually eluded, of courſe gave birth to others. Every new conqueſt brought an acceſſion of riches, and became a ſource of farther regulations: until, at length, they ſwelled to ſuch a magnitude, as to become, in the time of Juſtinian, an intolerable burthen:— For, to ſay nothing of the laws themſelves, the *ſenatus conſulta*, the *plebiſcita*, the *edictum perpetuum*, and the conſtitutions of the emperors, which were very voluminous, the bare commentaries of the lawyers of authority amounted to three thouſand volumes.

If we look around the nations that now inhabit Europe, we ſhall find that the ſame cauſes have conſtantly, every where, produced the ſame effect. How few, how ſhort,

† Spencer, Diſſert. de ratione Leg. Uſuram prohibentis.

how

how plain, and ſimple, were the ancient laws of the Saxons, the Franks, the Burgundians, the Goths, and the Lombards, while each of them continued a plain and ſimple people†. As they increaſed in arts and wealth, as their kingdoms grew more powerful, either from internal peace and commerce, or by the melting of different ſovereignties into one, we might ſee the laws gradually increaſe in number and in length; this aroſe from the neceſſity their legiſlators were under, from the different circumſtances of the times and people, to enter into details of which their ruder anceſtors had no conception: and this augmentation hath ever been in proportion to the wealth and power of the people that was obliged to admit it; as might eaſily appear by fixing on any one period, and by comparing the laws of thoſe nations where arts and trade were fully eſtabliſhed, with thoſe of others where they had not yet got ſo firm a footing.

Within theſe laſt two hundred and fifty years, the inhabitants of Europe in general, particularly thoſe that have any conſiderable ſhare in univerſal commerce, ſeem to have been ſeized with an epidemical madneſs of making new laws; inſomuch that there is ſcarce a ſtate whoſe laws, ſince the year 1500, are not equal, if not ſuperior, in number and bulk, to thoſe made in many preceding ages: an effect owing, partly to the decay of the old military ſyſtem, and to the neceſſity every government was under, to have recourſe to new methods for its ſupport, when that failed; but principally to the diſcoveries of America, and of the paſſage to the Eaſt Indies; which, by the peaceful arts of induſtry and trade, have poured into modern Europe an acceſſion of treaſure, equal to what was amaſſed in Italy by conqueſt and rapine under the Roman empire. As

† Lindenbrogius, codex legum antiquarum.

Britain,

Britain, during this interval, ſhared more largely than any other country in this vaſt increaſe of wealth, it is not ſurpriſing that her later laws have been numerous and voluminous in proportion.

But there is another cauſe peculiar to theſe nations, which hath not a little contributed to the ſame end, namely, that happy conſtitution, and that liberty in which we ſo juſtly glory. A conſtitution which lodges the ſupreme, the legiſlative power in three different hands, each of which (if conſidered apart) hath an intereſt ſeparate and diſtinct from the other two, muſt require a variety of wiſe regulations, ſo to aſcertain their reſpective rights and privileges, and ſo to poiſe and balance them, as to put it out of the power of any one to overtop the others. A conſtitution that admits the people, by repreſentation, to ſo conſiderable a ſhare of power, muſt have many laws to determine the manner of elections, and the qualifications both of electors and elected. A conſtitution that makes the preſervation of political freedom its great object, and that aims to defend the life, liberty, and property of the meaneſt individual, not only againſt others of their own rank, but even againſt the executive power of the ſociety itſelf, muſt have many extraordinary fenc es, and arriers, to protect the weak from the mighty. Such a conſtitution muſt, more particularly than others, reſtrain its judges, the diſpenſers of juſtice, who are, at the appointment of the crown, to follow the ſtrict letter of the poſitive laws; leſt, under the pretence of explaining and extending them, the moſt valuable privileges of the people might be betrayed, or rendered illuſory. And this very reſtraint, ſo neceſſary in ſuch a form of government, will eternally (as new caſes ariſe, which, not being in the contemplation of the legiſlature at the time, were not comprehended in the words of the old proviſions) occaſion the framing of new ones.

The

fences & barriers

The ſtate and condition of theſe kingdoms are ſuch, therefore, as neceſſarily require a great number of laws; and heavy as the burden of them may ſeem, it ſhould be borne with chearfulneſs, by all who eſteem the conveniencies of life, and the perfection of arts, more than a rude and ſimple ſtate of nature; who think wealth more eligible than poverty, and power than weakneſs; or laſtly, who prefer our excellent form of government, and its mild adminiſtration, to the deſpotic tyrannies of Aſia, or the more moderately abſolute monarchies of Europe.

From what hath been already obſerved, the difficulties attending this ſtudy in theſe kingdoms will readily appear; but theſe, inſtead of diſcouraging, ſhould animate every gentleman, and inſpire him with reſolution to ſurmount them; when he conſiders them as inſeparable from the happy ſituation in which we are placed, and that the character of an upright and ſkilful lawyer is one of the moſt glorious, becauſe one of the moſt uſeful to mankind; that he is a ſupport and defence of the weak, the protector of the injured, the guardian of the lives and properties of his fellow citizens, the vindicator of public wrongs, the common ſervant both of prince and people, and, in theſe countries, the faithful guardian of thoſe liberties in which we pride ourſelves, and which the bounteous Creator beſtowed originally on all the ſons of Adam, and would have continued to them, had they continued worthy of the bleſſing.

From hence, likewiſe, abundantly appears the neceſſity of proper methods being pointed out for the ſtudy of the laws, and of proper aſſiſtance being given to the youth intended for this profeſſion. This was always allowed, and for this purpoſe were the inns of court originally founded; and it muſt be owned, that in ancient times, they, in a great meaſure, anſwered the end. Their exerciſes, in

thoſe days, were not mere matters of form, but real teſts of the ſtudent's proficiency. Their readers laid down, in their lectures, the principles of particular parts of the law, explained the difficulties, and reconciled the ſeeming contradictions, though, at the ſame time, it muſt be owned, too many of them exerted themſelves in diſplaying their own ſkill and depth of knowledge in the profeſſion, rather than in removing the obſtructions, and ſmoothing the ruggedneſs which are ſo apt to diſcourage beginners, and which all beginners muſt meet in this untrodden path, without a guide. But, ſince the time that theſe aids have been there laid aſide, and that, in the midſt of ſo great and ſo rich a city, any degree of reſtraint or academical diſcipline, to keep the ſtudents conſtantly attentive to the buſineſs they are engaged in, hath been found impracticable, it has been the wiſh of every conſidering perſon, that the elements of this ſcience ſhould be taught in ſome more eligible place, where the ſtudents may at once have the benefit of a proper method of inſtruction, and by proper regulations be obliged to improve themſelves in a ſtudy ſo important both to them and the public.

That the univerſities, the ſeats of all other branches of learning, are the places moſt fit for this purpoſe, hath been ſo fully proved by Mr. Blackſtone, in his preliminary lecture, not long ſince reprinted in this kingdom, that it will be much more proper and decent for me to refer gentlemen to that excellent performance, than to weaken his arguments, by repeating, in other words, what he has demonſtrated, with ſuch force of reaſon, and elegance of expreſſion. I ſhall only add to what he hath obſerved, that every other nation of Europe hath admitted the profeſſion of their municipal laws into their univerſities, and that the ſame hath been the opinion and practice of almoſt every

every age and country, as far back as the lights of hiſtory extend. Were not the laws of Egypt, as well as their religion, phyſick, hiſtory, and ſciences, taught in the colleges of their prieſts? It is allowed by all, that the principal employment in the ſchools of the prophets was the ſtudy of the law of Moſes; and, to come to more modern times, the very firſt univerſities that were ever founded by royal authority, were the works of Roman emperors, and erected merely for this profeſſion. The famous academies of Rome for the weſt, and of Berytus for the eaſt, furniſhed that extenſive empire with a conſtant ſucceſſion of excellent lawyers, whoſe names, and the fragments of whoſe works were held in the higheſt honour, until the inundation of barbarians from the north of Europe, and the prevailing arms of the Saracens in the eaſt extinguiſhed the Roman government in thoſe parts. But that of Conſtantinople, founded ſoon after the tranſlation of the ſeat of empire thither, had a more happy deſtiny, flouriſhed with diſtinguiſhed reputation to theſe later ages, and periſhed not, but with the empire itſelf, when that city was taken by the Turks. Nay, ſo ſenſible were the Arabs themſelves, who deſtroyed the Roman academy of Berytus, of the utility of ſuch inſtitutions, that, for their own law, they erected others of the ſame nature in Bagdad†.

Another powerful reaſon for laying the foundation of this branch of learning in theſe ſeats of literature, ariſes from the great utility, or rather, indeed, neceſſity, that all gentlemen bred in them are under, of gaining a general idea, at leaſt, of the principles and practice of the law of their

† Conringius de Antiquitatibus Academicis. Bruckerus, Hiſt. Philoſ. Giannone's hiſt. of Naples, lib. 1. chap. 10. § 1. and 11. lib. 11. chap. 6. § 1

their country. How advantageous this would be to every rank of gentlemen, whether legiſlators, magiſtrates, divines, or jurymen; and to all, in ſhort, who have any property, to preſerve, or tranſmit, or who have wiſhes or deſires to acquire any, may be ſeen at large, illuſtrated by Mr. Blackſtone in the ſame performance. And indeed, if, before the attempt, there could be any doubts of the propriety of beginning this ſtudy in an univerſity, the extraordinary ſucceſs of his lectures in Oxford, and the high reputation he hath ſo juſtly acquired thereby, leave no room for entertaining ſuch at preſent. For though much of both muſt be attributed to the ſingular abilities of that gentleman, yet it muſt be allowed that the moſt ſkilful gardener cannot make a tree flouriſh in a ſoil unnatural to its growth. With the deepeſt gratitude, therefore, ſhould the members of this univerſity acknowledge the munificence, and the wiſdom of our preſent moſt gracious ſovereign, who eſtabliſhed the preſent foundation for the benefit of the youth of this kingdom.

But if the importance of this inſtitution to the public be conſidered, together with the difficulties attending the juſt execution of it, when theſe difficulties are enhanced by the novelty of the attempt, when the public attention is engaged by that very novelty, and when the future ſucceſs of the foundation, may, perhaps, in ſome meaſure, depend on the opinion conceived of it at the beginning; he muſt, indeed, be poſſeſſed of a very overweening opinion of his own abilities, who can undertake ſo arduous a taſk, without feeling ſtrong apprehenſions at the firſt ſetting out. All the return the perſon thought worthy by this learned body to fill this chair can make them for ſo high an honour, and ſo important a truſt, is to aſſure them, that the utmoſt care, and the greateſt exertion of what know-

knowledge and abilities he poſſeſſeth, ſhall be employed to anſwer the ends propoſed, and to juſtify, as far as in him lies, the choice they have made. And if the young gentlemen for whoſe benefit theſe lectures are deſigned, poſſeſſed with a juſt notion of the great utility to themſelves, and their country, of the ſtudy they are engaged in, will exert that induſtry, for the honour of their mother univerſity, which hath made her ſo long famous for other branches of learning; he doubteth not but his weak endeavours at the firſt eſſay, will not only merit indulgence, but in the end be crowned with conſiderable ſucceſs. On their aſſiduity, as well as upon his ſkill, muſt the ſucceſs of the undertaking depend.

In the next lecture the grounds and reaſons of the plan propoſed, as moſt proper for the commencing this ſtudy in this univerſity, ſhall be laid open, in hopes that the ſtudents will proceed with the more alacrity, if they can be once convinced they are ſet in the right track, and that, by the profeſſor's laying before the public the inducements he had to prefer this before any other, he may acquire information from the ſkilful of its errors and imperfections, and, conſequently, alter it, ſo as moſt effectually to anſwer the uſeful ends of the inſtitution.

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LECTURE II.

The plan of the preſent undertaking—The particulars in which it differs from that adopted by Mr. Blackſtone—The different ſituations of the Univerſities of Oxford and Dublin—The chief obſtructions which occur to the ſtudent of the Engliſh laws—The methods which may be employed to remove them—The law of things *more proper to introduce a ſyſtem of juriſprudence than the law of* perſons—*The law of* things, *or of real property in England, has its ſource in the feudal cuſtoms—The neceſſity of a general acquaintance with the principles of the feudal polity—The method in which it is propoſed to treat of it.*

HAVING, in the preceding lecture, ſhewn the neceſſity of a proper method being pointed out for the ſtudy of the laws of theſe kingdoms, from the utility, as well as multiplicity of them; and having explained from whence that multiplicity ariſes, and that it is inſeparable from the happy ſituation we are placed in; and having acknowledged the great advantage the ſtudents of Oxford have received from Mr. Blackſtone's lectures, it will doubtleſs be thought neceſſary, that ſomething ſhould be ſaid by way of illuſtration of the plan propoſed to be followed here, and in juſtification of its departure from the excellent one which that gentleman has given us in his analyſis. The method of inſtruction intended to be purſued in this place is not propoſed as more perfect, or abſolutely better in itſelf, but as one that appears more adapted to the circumſtances of our ſtudents; and as it will be allowed, that his courſe of lectures, in the manner they proceed, hath ſome great advantages as to the finiſh-

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ing a lawyer, which cannot be attained, and therefore ſhould not be attempted here, it will be particularly the duty of your profeſſor to compenſate for thoſe, by guarding againſt ſome inconveniencies, which the extenſiveneſs of his plan muſt of neceſſity ſubject young beginners to. I ſhall, therefore, proceed briefly to compare the ſituation of the two univerſities, in hopes, by that conſideration, in ſome meaſure to vindicate the ſeveral particulars wherein I have choſen to vary from his ſcheme. The attendance on the courts of Weſtminſter-Hall, when once a gentleman hath read and digeſted enough to liſten with underſtanding to what he there hears, hath, for a ſucceſſion of ages, been allowed to be, and it muſt be owned is, the moſt effectual means of accompliſhing a lawyer, and fitting him for practice. In this reſpect Oxford, in her proximity to Weſtminſter, hath certainly an advantage, as to her law ſtudents of above two years ſtanding, who may at that time be ſuppoſed capable of improvement by the arguments in the courts of law; as ſhe is thereby rendered capable of conjoining thoſe two excellent methods of inſtruction. Mr. Blackſtone was fully ſenſible of this happy circumſtance, and, accordingly, his ſcheme is adapted to it. All the lectures there are appointed at times that fall in the law vacations, and the courſe is general and diffuſive, not calculated merely for attendants of the firſt and ſecond years, but adapted alſo to thoſe of a more advanced ſtanding, and conſequently, in a manner equally copious, or very nearly ſo, illuſtrates every one of the branches of the Engliſh law. But this method, however excellent in itſelf, and moſt eligible where gentlemen can have an opportunity of attending the profeſſor for ſeveral ſucceſſive years, muſt, on the other hand, be allowed to labour under ſome inconveniencies, eſpecially as to thoſe who are yet novices, which, as it ſhould be the particular

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care of the profeſſor here to obviate, it cannot be improper briefly to point out.

As the lectures of the Engliſh profeſſor are all read in the law vacations, and in all of them, except the long one, when few young gentlemen of fortune ſtay in the univerſities, the ſhortneſs of theſe vacations neceſſarily occaſions theſe lectures to follow each other in a very quick ſucceſſion; and, accordingly, we find that five are delivered in every week. It is impoſſible, therefore, that the ſtudents at firſt ſhould keep any manner of pace with their profeſſor in their private reading, without which the ableſt performances in the way of prelections will be of little utility. Many things in the ſucceeding ones muſt be rendered very difficult, if not abſolutely unintelligible, for want of a due time for maſtering and digeſting thoſe that preceded; and another unhappy conſequence of this quick ſucceſſion is, that the moſt uſeful and effectual method of inſtruction to beginners, at their entrance upon any ſcience, namely, a continued examination of the progreſs they have made, is hereby entirely precluded, and rendered impracticable. The great advantage of that method need not be enlarged upon in this place, as every gentleman who hears me muſt be already fully ſatisfied of it from his own experience.

But this univerſity is circumſtanced in a very different manner. The neceſſity our ſtudents are under of repairing to Weſtminſter, to finiſh their ſtudies, before they are called to the bar, and their incapacity to reap any benefit from the courts of law while they reſide here, render it impoſſible, as well as unneceſſary, to conjoin thoſe two methods of inſtruction before-mentioned, as is done at Oxford; and, by confining the profeſſor to pupils of two years ſtanding or little more, make it highly improper for

for him to enter minutely into thoſe parts of the law his audience have not yet had time to apply to. His great object, therefore, ſhould be ſo to frame his lectures, as to be moſt uſeful to youth at the beginning, to be particular and copious in the elementary parts, in order to lay a ſure foundation, and to ſmooth and make plain the difficulties which at firſt will every where occur. And as, for theſe reaſons, a general and equally diffuſive courſe is a method improper for him to purſue, it ſhould be his eſpecial care to avoid, or remedy the inconveniencies with which ſuch an one is neceſſarily attended.

It is a well known truth, that the entrance on any ſtudy, however eaſy and agreeable ſuch ſtudy might be after ſome progreſs made in it, is at the beginning very irkſome, and attended with many perplexities; principally ariſing from the uſe of new terms, whoſe ſignifications are yet unknown. But the laws of all nations, and thoſe of England above all others, abound in ſuch novel words, and old ones uſed in an uncommon ſenſe, more than any other ſcience, and therefore muſt be attended with difficulties in proportion. And although many of its terms occur frequently in common converſation, and may, conſequently, be ſuppoſed already underſtood, this is rather a diſadvantage than otherwiſe; for in common diſcourſe they are uſed in ſo vague and undetermined a meaning, and ſo far from ſtrict preciſion and propriety, that it is no wonder ſo many perſons exclaim at the abſurdity of its maxims; which, though frequently in their mouths, they do not really underſtand. Young gentlemen, then, have not only many new words to acquire the ſignification of, but they muſt likewiſe unlearn the import of many others they are already acquainted with, and affix to thoſe familiar terms new and preciſe ideas, a taſk, as Mr. Locke obſerves, of no ſmall difficulty, and that requires not only the ſtricteſt attention, but conſtant

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care and frequent repetition. Another great difficulty the ſtudy of the law of England labours under, peculiar to itſelf, is that want of method, ſo obvious to be obſerved, and ſo often complained of in its writers of authority, inſomuch, that almoſt all of them, and lord Coke particularly, are too apt to puzzle and bewilder young beginners; whereas other laws, the civil, the canon, the feudal, have books of approved authority, (and none other but ſuch ſhould be put into the ſtudents hands,) calculated purpoſely for the inſtruction of novices; wherein the general outlines of the whole law are laid down, the ſeveral parts of it properly diſtributed, its terms explained, and the moſt common of its rules and maxims, with the reaſons of them, delivered and inculcated. It is not to be admired then that Sir Henry Spelman ſo pathetically deſcribes his diſtreſs at his firſt entrance upon this ſtudy. *Emiſit me mater Londinum, juris noſtri capeſſendi gratia, cujus cum veſtibulum ſalutaſſem, reperiſſemque linguam peregrinam, dialectum barbarum, methodum inconcinnam, molem non ingentem ſolum, ſed perpetuis humeris ſuſtinendam, excidit mihi fateor animus* *.

Theſe then are the obſtructions to be removed, and the difficulties to be obviated, by a profeſſor who conſiders it his buſineſs to lead by the hand young gentlemen, yet ſtrangers to the ſtudy; and for this purpoſe he ſhould exert his utmoſt care and attention, not to overburthen the memories, or to diſtract the attention of his audience with too great variety at firſt, but to feed them with knowledge as he finds them capable, and to give them time, by reading and meditation, to become maſters of what they have already acquired, and by frequent examinations to ſatisfy himſelf they thoroughly comprehend and retain the ſubſtance of his paſt lectures. The utility of this laſt me-

* Præfat ad Gloſſar.

thod, by which the ſtudents will be laid under a neceſſity of reading in private, as to them, will be readily allowed; but taken in another view will be of no leſs aſſiſtance to the profeſſor himſelf, in framing the prelections he is to read. He will not only be encouraged to proceed with more alacrity, when he daily obſerves the ſucceſs of his endeavours, but alſo, by the trial, be convinced of any defects or errors in his plan that before eſcaped his obſervation, and will be warned thereby to amend them; and he will by this means be particularly and perpetually cautioned againſt the great and too common miſtake of tutors, namely, their imagining that ſuch explications as are eaſy and familiar to them, will be equally obvious to unexperienced youth. But an examination will demonſtrably ſhew him where his illuſtrations have been defective or obſcure, and will oblige him to accommodate his lectures to the capacity and progreſs of his hearers. The next variation in the preſent plan from that of Mr. Blackſtone, to be taken notice of, is the propoſal of beginning with the law of *things*, not with the law of *perſons*, as he hath done. It muſt be allowed impoſſible thoroughly to underſtand the law of things, without ſome previous knowledge of that of perſons; but it is equally impoſſible to be maſter of the law of perſons, without an acquaintance with that of things. Since, therefore, we muſt begin with one of them, perhaps it will be ſufficient to obſerve, that ſuch knowledge of the names and relations of perſons, as is generally acquired by obſervation, before a perſon arrives at an age fit for engaging in this ſtudy, will enable him tolerably to underſtand the law of things; and that whatever more is neceſſary, and hath not been attained by this means, may be eaſily ſupplied as the ſtudent goes on. And, that I may not be thought to lean too much on my own opinion in this particular, I ſhall quote the famous Sir Matthew Hale to the ſame purpoſe; who, in his Analyſis, introduces the law of things in the following manner:

ner: "Having done with the rights of perſons, I now "come to the rights of things; and, though, according to "the uſual method of civilians, and of our ancient common "law tractates, this comes in the ſecond place, and after "the *jura perſonarum*, and therefore I have herein purſued "the ſame courſe; yet that muſt not be the method of a "young ſtudent of the common law, but he muſt begin his "ſtudy here, at the *jura rerum*; for the former part con-"tains matter proper for the ſtudy of one that is well ac-"quainted with thoſe *jura rerum* *." And, agreeably hereto, the wiſdom of ages hath declared *Littleton's Tenures*, which contains the common law of England, as far as it concerns real property, that is, lands or intereſts derived out of and flowing from them, to be the book moſt proper for ſtudents to begin with, in their ſtudy of the law of theſe nations.

Taking it then for granted at preſent, that the law of real property is the fitteſt introduction, it will be neceſſary, as it is confeſſed to be the moſt important, the moſt extenſive, and, in conſequence, the moſt difficult part, to lay the foundation deep and ſure, and to derive its rules from what is now univerſally allowed to be its ſource, the feudal cuſtoms. This, indeed, hath been denied by Lord Coke, and others of his age; who thought it would depreciate the excellence of the laws of their country, to admit they were derived from any other nation. But if thoſe gentlemen had read over but once the two books of the feudal law with tolerable attention, they muſt have received conviction, that one of the laws was certainly derived from the other; and which of them was ſo would eaſily appear, by comparing the law of England after the conqueſt, with that which prevailed in the Saxon times, and was not ſtrictly feudal, excluſive of the teſtimony of the old hiſtorians.

* P. 55.

But, perhaps, for this purpoſe, it may be thought ſufficient to explain and deduce theſe rules from the feudal ones, as they occur occaſionally in the books of the common law; which is the method, that, in conformity to the reſt of his plan, the Oxford profeſſor has adopted, and that the reading through a courſe of that law, even the ſhorteſt, will be attended with an unprofitable delay, and detain the ſtudents too long from their principal object. The anſwer to this objection is ſhort, and, if well founded, perfectly ſatisfactory. It is, that the real reaſon of propoſing a ſyſtem of the feudal law to be gone through, was to ſave time. The method is ſo much better and clearer, and, by neceſſary conſequence, ſo much eaſier to be comprehended, and retained, that the delay will be abundantly compenſated, and one third at leaſt of Littleton will be underſtood, and known by the ſtudents, before they open his book. For the maxims of the common law, as they lie diſperſed in our books, often without reaſons, and often with falſe or frivolous ones, appear disjointed and unconnected, and as ſo many ſeparate and independent axioms; and in this light very many of them muſt appear unaccountable, at leaſt, if not abſurd; whereas, in truth, they are almoſt every one of them deducible, by a train of neceſſary conſequences, from a few plain and ſimple rules, that were abſolutely neceſſary to the being and preſervation of ſuch kind of conſtitutions as the feudal kingdoms were. The knowledge of which few, timely obtained, will obviate the neceſſity of frequent and laboured illuſtrations, as often as theſe maxims occur in our law, will reconcile many ſeeming contradictions, and will ſhew that many diſtinctions, which at firſt view appear to be without a difference, are founded in juſt and evident reaſon: to ſay nothing of the improvement the mind will attain by exerciſe, in following ſuch a train of deductions, and the great help to the memory, by acquiring a perfect knowledge of the true grounds of thoſe various rules, and of their mutual connec-

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tion with and dependence on each other. *Ignoratis cauſis rerum, ut res ipſas ignoretis, neceſſe eſt*, is a maxim frequently in our lawyers mouths; and Littleton and Coke continually exhort the ſtudent to explore the grounds and reaſons of the law, as the only ſafe foundations to build on, and deny that any man, without being perfectly acquainted with them, can merit the honourable appellation of a lawyer.

But there is another, and, for gentlemen of rank and fortune particularly, a more important conſideration, that renders a general acquaintance with the principles of the feudal law very proper at all times, but at preſent eminently ſo; namely, the neceſſity of knowing theſe, for the underſtanding the nature of thoſe Gothic forms of government, which, until theſe laſt three hundred years, prevailed univerſally through Europe, and whence the preſent conſtitution, with ſeveral corrections and improvements indeed, in which theſe iſlands are now ſo happy, is undoubtedly derived. From hence only ſhall we be able to determine whether the monarchy of England, as pretended, was originally and rightfully an abſolute royalty, controuled and checked by the virtue of the prince alone, and whether the privileges of the ſubjects, which we are ſo proud of, were uſurpations on the royal authority, the fruits of proſperous rebellion, or at beſt the conceſſions of gracious princes to a dutiful people, and revokable by them or their ſucceſſors, whenever, in their opinion, their vaſſals ſhould become undeſerving; principles that were induſtriouſly, and, to the misfortune of a deluded royal family, too ſucceſsfully propagated during the laſt century, and that, of late, have been revived and defended, with no leſs zeal, than ſeeming plauſibility. Every man, indeed, of candour and humanity, will look with tenderneſs on the errors of princes, unhappily educated in miſtaken notions,

and

and make due allowances for the weight which arguments urged with great apparent force of reaſon, concurring with the luſt of power, ſo natural to the human breaſt, will certainly have on ſuch minds; but, ſurely, this indulgence may be carried too far, and will be allowed ſo to be, if, for their juſtification, it ſhall appear, upon examination, that the hiſtory of paſt ages has been partially delivered down, and perverted; and that to the vain and unprofitable grandeur of the prince, the happineſs of millions, and their poſterity, hath been attempted to be offered up in ſacrifice. The queſtion is of a matter of fact; for on the deciſion of the fact, how the conſtitution of England anciently ſtood, the queſtion of the right ſolely depends. And ſurely it is the duty of every gentleman to inform himſelf, on the beſt grounds, whether thoſe great men, who, for a ſucceſſion of ages, expoſed their lives in the field, or exerted their eloquence and wiſdom in the ſenate, for the purpoſe of preſerving, and perpetuating theſe privileges, deſerved the honourable name of patriots, or the deteſtable appellation of rebels; whether the grievances our glorious deliverer came to redreſs were real or imaginary; or, if real, were ſuch as our fathers were in conſcience bound to ſubmit to; and whether we can with juſtice give to the family that now fills our throne with ſuch luſtre and dignity, that title which they have always eſteemed as their higheſt honour of being the lords of freemen, and the aſſertors of the liberties of mankind.

As the book * which it is intended the young gentlemen ſhall read for the purpoſe of acquiring a general idea of the feudal law, is compoſed in a ſyſtematical method, it is propoſed that theſe lectures ſhall proceed in an hiſtorical one, in order to ſhew the original reaſons of thoſe cuſtoms, and to point out from what ſmall beginnings, and by what particular ſteps and gradations the mighty fabrick roſe. By this

† Corvini jus feudale.

this means the additions to, and the alterations of the law will be ſeen in a clearer light, when we are acquainted with the nature of the regulations already in being; and by knowing the circumſtances of the times, can at once perceive the wiſdom and neceſſity of ſuch additions and alterations. And it is hard to imagine a ſtudy more improving, more agreeable, or better adapted to a liberal mind, than to learn how, from a mere military ſyſtem, formed and created by the neceſſities of a barbarous people, for the preſervation of their conqueſts, a more extenſive and generous model of government, better adapted to the natural liberties of mankind, took place; how, by degrees, as the danger from the vanquiſhed ſubſided, the feudal policy opened her arms, and gradually received the moſt eminent of the conquered nation to make one people with their conquerors; how arts and commerce, at firſt contemptible to a fierce and ſavage people, in time gained credit to their profeſſors, and an admittance for them into the privileges of the ſociety; and how, at length, with reſpect to the loweſt claſs of people, which ſtill continued in ſervitude, its rigour inſenſibly abated; until, in the end, the chains of vaſſalage fell off of themſelves, and left the meaneſt individual, in point of ſecurity, on an equal footing with the greateſt.

Thus much has been thought neceſſary to obſerve, in order to ſhew the reaſons of propoſing a courſe of the feudal laws, as an introduction to the Engliſh; to which may be added, that this method hath received the approbation of many good judges, and hath, in experience, been found not only uſeful for the end propoſed, as it is the conſtant practice in Scotland, whoſe laws, except in the manner of adminiſtering juſtice, differ little from ours, and hath been alſo uſed in England with good ſucceſs; but, at the ſame time entertaining, and improving in other reſpects.

As

As we are to begin, therefore, with this law, the obſervations on the remaining parts of the plan may be, for the preſent, deferred; I ſhall, in my next lecture, begin to deduce the origin of this law, and of its rules, from the cuſtoms of the German nations, before they invaded the Roman empire.

LEC-

LECTURE III.

An enumeration and confutation of ſeveral opinions concerning the foundation of the feudal cuſtoms—The origin and rules of the feudal law to be deduced from the inſtitution of the German nations before they invaded the Roman empire—The Engliſh indebted for this law to the Franks—A general deſcription of this people, with an account of the ſeveral orders of men into which they were divided while they continued in Germany.

THE feudal cuſtoms ſucceeded the Roman imperial law in almoſt every country in Europe, and became a kind of a *jus gentium*; but having ſprung up in rude illiterate ages, and grown by ſlow degrees to a ſtate of maturity, it is no wonder that very different have been the opinions concerning their origin, and that many nations have contended for the honour of giving them birth, and of having communicated them to others. Several eminent civilians, ſmit with the beauty of the Roman law, and filled with magnificent ideas of the greatneſs of that empire, have imagined that nothing noble, beautiful, or wiſe, in the ſcience of legiſlation, could flow from any other ſource; and, accordingly, have fixed on Rome as the parent of the feudal conſtitutions. But as the paths of error are many, and diſagreeing, ſo have their endeavours to make out, and defend this opinion, been various in proportion; a ſhort mention of them, and a very few obſervations, will be ſufficient to convince us, that they have been all miſtaken.

Firſt,

Firſt, then, ſome civil lawyers have diſcovered a likeneſs between the Roman patrons and clients, an inſtitution as early as Romulus himſelf, and the feudal lords and vaſſals†. The clients, we are told, paid the higheſt deference and reſpect to their patrons, aſſiſted them with their votes and intereſt; and, if reduced to indigence, ſupplied their neceſſities by contributions among themſelves, and portioned off their daughters. On the other hand, the patrons were ſtanding advocates for their clients, and obliged to defend, in the courts of law, their lives and fortunes. The like reſpect was paid by vaſſals to their lords, and ſimilar aſſiſtance was given to their wants. The fortune of the firſt daughter, at leaſt, was always paid by them, and if they were impleaded, they called in their lords to warrant and defend their lands and other property. Thus far, we muſt confeſs, there is a ſtrong reſemblance; but the differences are no leſs material, and ſhew plainly that the one could not proceed from the other. The connection between the patron and the client was merely civil; whereas the relation between the lord and the proper vaſſal was entirely military; and his fealty to his ſuperior was confirmed by the ſanction of an oath, whereas there was no ſuch tie between patron and client. The aids which the tenant gave to his lord's neceſſities, except in three inſtances, eſtabliſhed by cuſtom, to redeem his lord's body taken in war, to make his eldeſt ſon a knight, and for the firſt marriage of his eldeſt daughter, were purely voluntary. But the great point which diſtinguiſhes them was, that whereas the Roman client's eſtate was his abſolute property, and in his own diſpoſal, the feudal

† See Craig, de Feud. lib. 1. dieg. 5. and Selden's Titles of Honour, part ſecond, chap. 1. § 23. Baſnage, Coutume reformée de Normandie, tom. 1. p. 139.

feudal vaſſal had but a qualified intereſt. He could not bequeath, he could not alien, without his lord's conſent. The *dominium verum* remained with the lord to whom the land originally had belonged, and from whom it moved to the tenant. Upon the failure therefore of the tenant's life, if it was not granted tranſmiſſible to heirs, or if it was, on the failure of heirs to the lands, it reverted to the original proprietor. Neither was the lord, on all occaſions, and in every cauſe, bound to be his vaſſal's advocate, or, as they expreſs it, *bound to warranty*, and obliged to come in and defend his tenant's right and property. For the fealty on one ſide, and the protection on the other, extended no farther than the feudal contract; and therefore the one was not bound to warrant any of the tenant's lands, but ſuch as were holden of him, nor the other to give aid, or do ſervice in regard of his whole property, but in proportion to that only which he derived from his ſuperior. Add to this, that the lord, in conſideration of the lands having been originally his, retained a juriſdiction over all his tenants dwelling thereon, and in his court ſat in judgment and determined their controverſies. Theſe ſtriking diverſities (and many more there are) it is apprehended, will be ſufficient to demonſtrate the impoſſibility of deriving the feudal cuſtoms from the *old* inſtitution of patron and client among the Romans.

Secondly, Others, ſenſible that military ſervice was the firſt ſpring, and the grand conſideration of all feudal donations, have ſurmiſed, that the grants of forfeited lands by the dictators Sylla and Cæſar, and afterwards by the triumvirs Octavius, Anthony and Lepidus, to their veterans, gave the firſt riſe to them†. In anſwer to this, I obſerve, that thoſe lands, when once given, were of the nature

† Selden Ibid. Craig, lib. 1. dieg. 5.

nature of all other Roman eſtates, and as different from fiefs, as the eſtates of clients, which we have already ſpoken of, were. Beſides, theſe were given as a reward for paſt ſervices, to ſoldiers worn out with toil, and unfit for farther warfare; whereas fiefs were given at firſt gratuitouſly, and to vigorous warriors, to enable them to do future military ſervice.

Others have looked upon the emperor Alexander Severus‡ as the firſt introducer of theſe tenures, becauſe he had diſtributed lands on the borders of the empire, which he had recovered from the Barbarians, among his ſoldiers, on the condition of their defending them from the incurſions of the enemy; and had granted, likewiſe, that they might paſs to their children, provided they continued the ſame defence. This opinion, indeed, is more plauſible than any of the reſt that derive their origin from the Romans, as theſe lands were given in conſideration of future military ſervice; yet, when we conſider, on the one hand, that in no other inſtance did theſe eſtates agree with fiefs, but had all the marks of Roman property; and that, on the other hand, feudal grants were not, for many ages, deſcendible to heirs, but ended, at fartheſt, with the life of the grantee, we ſhall be obliged to allow this notion to be as untenable as any of the foregoing.

The ſurmiſe of ſome others, that the feudal tenancies were derived from the Roman agents, bailiffs, uſufructuaries,

‡ This Emperor, ſays Lampridius, gave the territories gained on the frontiers, limitaneis ducibus et militibus, ita ut eorum eſſent ſi hæredes illorum militarent, nec unquam ad privatos pertinerent; dicens attentius eos militaturos ſi etiam ſua rura defenderent. Addidit ſane his et animalia et ſervos; ut poſſent colere quod acceperunt, ne per inopiam hominum vel per ſenectutem poſſidentium deſererentur rura vicina barbariæ, quod turpiſſimum eſſe dicebat. See alſo Molin. in conſuet. Pariſ. tit. 1. de Fiefs, and Loyſeau, des Off. lib. 1. chap. 1.

tuaries, or farmers, is ſcarce worth confuting; as theſe reſembled only, and that very little, the loweſt and moſt improper feuds; and them not in their original ſtate, when they were precarious, but when, in imitation of the proper military fief, which certainly was the original, they were become more permanent.

Laſtly, Some reſort as far as Conſtantinople for the riſe of fiefs, and tell us that Conſtantine Porphyrogenitus was their founder; but he lived in the tenth century, at a time that this law was already in France, Germany, Italy, and Spain, where it had arrived very near its full perfection, and was therefore undoubtedly his model: So that, tho' we muſt acknowledge him the firſt who introduced theſe tenures into the Roman empire, to find their original, we muſt look back into earlier ages, and among another people.

The pretenſions of the Romans having been conſidered, and ſet aſide, it follows, that this law muſt have taken its riſe among the barbarous nations; but from which of them particularly, remains to be inquired. Some, ſolicitous for the honour of the antient Gauls, quote Cæſar's account of their manners; *eos qui opibus valebant multos habuiſſe devotos, quos ſecum ducerent in bella, ſoldurios ſua lingua nuncupatos; quorum hæc eſt conditio, ut omnibus in vita commodis una cum his fruantur quorum ſe amicitiæ dediderint; ſi quid iis per vim accidat, aut eundem caſum una ferant aut ſibi mortem conſciſcant*†; in theſe words they imagine they have plainly the mutual connection between lords and vaſſals. The Spaniards too put in their claim for the ancient Celtiberians, of whom Plutarch, in his life of Sertorius and Valerius Maximus, gives the ſame account that Cæſar doth of the antient Gauls;

† De bell. Gall. lib. 4. chap. 22.

Gauls; and Sir Edward Coke, in his zeal for the common law of England, which, although he did not know it, is certainly feudal, relying on fabulous hiſtorians, carries its antiquity ſo far back as to the Britiſh kings of Geoffrey of Monmouth. But one ſhort and plain obſervation will fully diſſipate ſuch vain conceits, namely, that, whatever were the original cuſtoms of the barbarous nations, inhabiting Gaul, Spain, or Britain, they were, many ages before the riſe of this law, entirely annihilated and forgotten. Gaul, Spain, and Britain, were, for centuries, Roman provinces, governed entirely by Roman magiſtrates, according to the imperial laws. For the Romans were particularly ſtudious of introducing their dreſs, their language, their laws and cuſtoms, among the conquered nations, as the ſureſt, and moſt effectual means of keeping them in ſubjection.

Hence, it appears, we muſt find the true original of this law among thoſe nations, that deſtroyed the Weſtern Empire of the Romans; where we firſt perceive the traces of it, that is, among the Franks, Burgundians, Goths, and Lombards*. Of theſe the firſt and laſt have the greateſt number of advocates; and, whether out of jealouſy to the French monarchy, or not, I cannot determine, the majority declares for the Lombards. Theſe different opinions, however, may be eaſily adjuſted, by diſtinguiſhing between the *beneficiary law*, as I ſhall call it, while the grants were at will, or for years, or at the utmoſt for life, and that which is more properly and ſtrictly called *feudal*, when they became tranſmiſſible to heirs, and were ſettled as inheritances. As to the beneficiary law, no one of theſe nations can lay a better claim to it than another, or with reaſon pretend that the reſt formed their plan upon its model;

* Monteſquieu, L'eſprit des loix, liv. 30. chap. 2. and 6.

del; each of them independent of the other, having eſtabliſhed the ſame rules, or rules nearly the ſame; which were, in truth, no more than the ancient cuſtoms of each nation, while they lived beyond the Rhine, and were ſuch as were common to all the different people of Germany. But, as to the law and practice of feuds, when they became inheritances, there can be little doubt but it was owing to the Franks. For the books of the feudal law, written in Lombardy, acknowledge, that the Emperor Conrad, who lived about the year 1024, was the firſt that allowed fiefs to be deſcendible in Germany and Italy†; whereas the kingdom of the Lombards was deſtroyed by Charlemagne above two hundred years before; and he it was who firſt eſtabliſhed among his own Franks the ſucceſſion of fiefs, limiting it, indeed, only to one deſcent. His ſucceſſors continued the ſame practice, and, by ſlow degrees, this right of ſucceſſion was extended ſo, that by the time of Conrad, all the fiefs in France, great and ſmall, went in courſe of deſcent, by the conceſſion of Hugh Capet, who made uſe of that device, in order to ſweeten his uſurpation, and render it leſs diſagreeable‡. By this conceſſion he, indeed, eſtabliſhed his family on the throne, but ſo much weakened the power of that crown, that it coſt much trouble, and the labour of ſeveral centuries, to regain the ground then loſt.

The opinion of the feudal law's being derived from the Lombards ſeems owing to this, that, in their country, thoſe cuſtoms were firſt reduced into writing, and compiled in two books, about the year 1150, and have been received as authority in France, Germany and Spain, and conſtantly quoted as ſuch. But then it ſhould be conſidered, that the written law in theſe books is, in each of thoſe nations,

† Lib. Feud. 1. tit. 1.

‡ L'eſprit des loix, liv. 31. chap. 31.

tions, eſpecially in France, controuled by their unwritten cuſtoms; which ſhews plainly, that they are received only as evidence of their own old legal practices. For had they been taken in as a new law, they would have been entirely received, and adopted in the whole.

But, if, in this point, I ſhould be miſtaken, and the Lombards were really the firſt framers of the feudal law, yet I believe it will be allowed more proper for the perſon who fills this chair to deduce the progreſs of it through the Franks, from whom we certainly borrowed it, than to diſtract the attention of his audience, by diſplaying the ſeveral minute variations of this law, that happened as it was uſed in different nations. To the nation of the Franks, therefore, I ſhall principally confine myſelf, and endeavour to ſhew by what ſteps this ſyſtem of cuſtoms was formed among them, and how their conſtitution, the model of our own juſt after the conqueſt, aroſe; and at the ſame time I ſhall be particularly attentive to thoſe parts of it only that prevailed in England, or may ſome way contribute to illuſtrate our domeſtic inſtitutions.

In order, then, to illuſtrate the original of the French conſtitution, and of their beneficiary, and its ſucceſſor the feudal law, it will be neceſſary to enter into ſome details as to the manners of this people, while they continued in Germany, and which they preſerved for a conſiderable time after they paſſed the Rhine; as alſo to mention ſome few particulars of their hiſtory when ſettled in France, in order to ſhew the reaſons of their original cuſtoms, and the ends their policy aimed at, and how, by change of circumſtances, the preſervation of that ſyſtem required new regulations; how the feudal law aroſe, and grew to that perfection, in which, for ſo many ages, it flouriſhed throughout Europe. As ſkilful naturaliſts diſcover in the ſeed the rudiments of a future

future tree, ſo, in a few paſſages of Cæſar and Tacitus, concerning the cuſtoms of the Germans, may be ſeen the old feudal law, and all its original parts, in *embryo*; which, in proceſs of time, by gradually dilating and unfolding themſelves, grew into a perfect and complete body. It will be highly proper, therefore, for the clearer comprehenſion of what is to follow, to dwell ſomewhat particularly upon, and to make ourſelves acquainted with, the manners and inſtitutions of thoſe people; and for this purpoſe, perhaps, it will be ſufficient to conſider them under the ſeveral following heads, viz. their general diſpoſition and manners, the ſeveral ranks and orders of perſons among them, their form of government, and the nature of their policy; their regulations touching property, their methods of adminiſtering juſtice, and the nature of the puniſhments they inflicted on criminals.

Firſt, as to their manners and general diſpoſition: Germany was at that time a wild uncultivated country, divided into a great number of ſmall cantons, ſeparated from each other by thick foreſts, or impaſſable moraſſes, and inhabited by a rude and ſimple people, who lived either by the chace or paſturage, and were always either in a ſtate of open war, or a ſuſpicious peace with their neighbours: A circumſtance that obliged every one of theſe little ſtates to eſteem military virtue in the firſt place, and to train up all their people, fit for that purpoſe, in the conſtant uſe of arms, and to keep them perpetually in a ſtate ready always for either offence, or defence†.

But ſince, in every number of men, however aſſembled, ſome there will be, from the natural ſtrength of their bodies, and courage of their minds, more fit for ſoldiers,

† Tacitus de moribus Germanorum. Cæſar de bell. Gall. lib. 6.

and others, from the contrary cauſes, better adapted to the arts of peace; theſe nations were neceſſarily diſtributed into two ranks; thoſe in whom the ſtrength of the ſociety conſiſted, the freemen or ſoldiers, who were, properly ſpeaking, the only members of the community, and whoſe ſole employment was war, or (in the intervals of hoſtilities, what Xenophon conſiders as its image) hunting; and an inferior order of people, who were ſervants to them, and, in return for protection, ſupplied the warriors with the neceſſaries of life, occupied the lands for them, and paid ſtipulated rates of cattle, clothes, and ſometimes corn, namely, where they had learned the uſe of agriculture from the neighbouring Romans. I follow Craig in calling them ſervants rather than ſlaves, as an expreſſion much more ſuitable to their condition; for they were not condemned to laborious works, in the houſes of the freemen, as the ſlaves of other nations were. Among theſe ſimple people, the wives and children even of the greateſt among them, and the old men, unfit for the toils of war, were their only domeſtics. The ſervants of the Germans lived apart, in houſes of their own, and when they had rendered to their lords the ſervices due by agreement, they were ſecured in the reſt, as their own property; ſo that a ſervant among theſe people, though meanly conſidered by the ſuperior rank, was, in truth, more a freeman than the generality of the Romans under their Emperors†. It has been an ancient obſervation, that ſervitude among the northern nations hath always been more gentle and mild than among thoſe that lay more ſoutherly: A difference, to be aſcribed to the different manners of the people, reſulting partly from their climate, and partly from their way of life.

† Servis, non in noſtrum morem deſcriptis per familiam miniſterïis utuntur. Suam quiſque ſedem, ſuos penates regit. Frumenti modum dominus, aut pecoris, aut veſtis, ut colono injungit; et ſervus hactenus paret. Tacit. de mor. Germ. cap. 25.

life. A plain and ſimple people, unacquainted with delicacies, were contented with the plaineſt fair; which was eaſily ſupplied, without afflicting their ſervants with heavy labour, and gave no room for envy and diſcontent in the breaſts of inferiors. And a nation that had always the ſword in their hands were too conſcious of their own ſtrength, to entertain any apprehenſions from thoſe, who, from their unfitneſs for that profeſſion, were deſtined to other employments. All motives, therefore, to fear on the one ſide, and to envy and diſcontent on the other, being removed, we need not be ſurpriſed at the general humanity with which the ſervants were treated in theſe northern regions. The putting them in chains was a thing exceedingly rare, and the killing them, except in a ſudden guſt of paſſion (an accident which frequently happened among the freemen themſelves) was almoſt unheard of. The only difference in that caſe was, that the death of a ſervant was not looked upon as a public crime, he being no member of the political ſociety, and therefore was not puniſhed. Such then was the mutual affection and confidence of theſe two ranks in each other, that whenever there was occaſion, they made no ſcruple of arming ſuch of their ſervants as were capable, and, by making them ſoldiers, admitted them into the number of freemen; and the hopes of ſuch advancement, we may be aſſured, was a ſtrong inducement to thoſe of the lower rank to behave in their ſtation with fidelity and integrity. Another cauſe of this great lenity to their ſervants aroſe from a cuſtom peculiar to the Germans, which ordained, that inſolvent debtors ſhould be reduced to ſervitude, until, either by his labour, the creditor was ſatisfied, or, as it frequently happened, the debt was paid by the inſolvent's relations. It was, indeed, reputed diſhonourable for the creditor

himſelf to retain his debtor in ſervitude; but then he either ſold him to the prince, or ſome other perſon.

Among ſo plain a people, perhaps it may be thought debts were rare, and that few inſtances occurred of freemen's being reduced to ſlavery; but Tacitus aſſures us of the contrary†. Theſe people were poſſeſſed with the rage of gaming to ſuch a degree, that nothing was more common than to ſee them, when all their property was loſt, ſet their liberty itſelf at ſtake. It was natural, therefore, to treat thoſe with gentleneſs, who had been once perhaps the moſt valuable members of the body politic, eſpecially for them who knew their own privileges depended on the uncertain caprices of the ſame goddeſs Fortune, and that an unlucky throw might reduce them to-morrow to the ſame low condition. I have been the more particular on this head, in order to ſhew, that, even in their infancy, the feudal maxims were more favourable to the natural liberty of mankind, than the laws and cuſtoms of the ſouthern and more polite nations, and were of ſuch a ſpirit, as when circumſtances changed, would naturally expand, and extend that bleſſing to the whole body of the people; as we find it at preſent in our excellent conſtitution.

To return, therefore, to the freemen: We find no traces of any different orders of men amongſt them; but as no kind of government, however rude, can ſubſiſt without ſome ſubordination, and as it was impoſſible for them all to continue together in one body, it was found neceſſary, in order to diſperſe them round the country, that they ſhould be ſubdivided into leſſer parties, and to appoint to each a chief, the moſt eminent and capable among

† De mor. Germ. cap. 24.

among them; who, when a diſtrict was aſſigned him, diſtributed that among his followers; who again, after having retained what they eſteemed ſufficient for their own purpoſes, aſſigned part of what they had ſo received to their ſervants. And here, indeed, we ſee the firſt rude original of lords and vaſſals. Theſe lords were thoſe, of whom Tacitus ſays, *De minoribus rebus principes conſultant* §. One of theſe lords, and to him a larger territory was aſſigned than to the others, was the head of the whole body politic, and honoured with the title of king. He was the ſuperior, who, at their general aſſemblies, made the diſtribution already mentioned, and appointed the other lords. And, beſides his excelling the others in the enjoyment of a more extenſive diſtrict, and in having a greater number of vaſſals and ſervants, he was remarkably diſtinguiſhed from them in two particulars. His office was for life, and, in ſome degree, hereditary; for, in every nation there was one family, deſcended, it is to be preſumed, from the firſt founder of the ſtate, or ſome ancient hero, which was the only family noble by birth among them, and the members of which alone were capable of this high ſtation. Not that theſe kings ſucceeded in a lineal, or any other regular courſe of deſcent; for Tacitus intimates ſufficiently that they were elective, when he ſays, *Reges ex nobilitate ſumunt* †. And indeed any one who conſiders attentively the circumſtances of theſe people, always either ready to invade their neighbours, or dreading invaſions from them, will allow, that any kind of a conſtant regular ſucceſſion was inconſiſtent with their preſervation. They were neceſſitated to chooſe among the royal family a man in the flower of youth, or, at leaſt, in the vigour of life, who, by his valour and wiſdom, might prove the proper head of a nation always in a ſtate of

§ De mor. Germ. cap. 11. † Ibid. cap. 7.

of war. This will appear beyond a doubt, if we examine the ancient practice of all the kingdoms founded by the Germans. Look over the lists of their kings in any one nation, and examine the degree of kindred in which they stood related to each other, and you will find them all, indeed, of one family; but you will, at the same time, see that scarce a third of them could derive their kindred, by way of title or descent, from their immediate predecessor; yet were they obeyed chearfully by their subjects, nor ever looked upon in those days as usurpers, though several modern writers, possessed with opinions of their own ages, since kingdoms are almost universally settled in a regular course of descent, have been so liberal in bestowing that title upon them.

Montesquieu allows this was the manner of succession in the second race of the Franks, but insists that those of the first inherited lineally†. But was this so originally, when Clovis came to the crown, he who first united all the Franks under one sovereign? We find six or seven independent kings of the Salian Franks, every one of them Clovis's near relations, and consequently descended from a common ancestor, at no very great distance. He thought not himself, nor his posterity, secure in the possession of the throne, until he had totally extirpated every other branch, and reduced the royal family to his single person. Then, indeed, there was no danger of a competition upon his death. So far was the crown from descending to any determined person, that the kingdom was divided among all his children; and, for several descents, his bloody example was followed in one generation, and in the next a new division took place; nor, in all this time, do we hear of any other title set up, than what followed either

† L'esprit des loix, liv. 31.

either from the will of the father, the consent of the people, or the fortune of war; which, it is apprehended, is sufficient to shew, that, in these early ages, there were no invariable rules of succession settled among the Franks. Otherwise, how came the kingdom to be divisible, and the right heir to be obliged to content himself with a small portion of his supposed legal inheritance†?

In the next lecture I shall give an account of the companions of the prince among the Germans, and finish what I have to observe of the constitution of their governments, and of their laws and customs, unto the time of their entering into the Roman empire.

† Mably, Observations sur l'histoire de France, liv. 1. cap. 3.

LEC.

LECTURE IV.

The companions *of a German prince—The conſtitution of a German kingdom—The condition of property in Germany—The methods followed there of diſtributing juſtice, and the nature of the puniſhments inflicted on criminals.*

BEFORE we can be fully acquainted with all the ſeveral conſtituent parts of the German ſtate, it will be neceſſary to form a juſt notion of thoſe who were called the companions of the king or prince; who, being choſen out of the moſt robuſt and daring of the youth, and having attached themſelves particularly to the perſon of their ſovereign, were his chief defence in war, and the great ſupport of his dignity in times of tranquillity. A few words of Tacitus will ſet this inſtitution of theirs in a clear light. Speaking of their princes, he ſays, "This is their "principal ſtate, their chief ſtrength, to be at all times "ſurrounded with a numerous band of choſen young "men, for ornament and glory in peace, for ſecurity and "defence in war; nor is it among his own people only, "but alſo from the neighbouring communities, that a "prince reaps high honour, and great renown, when he "ſurpaſſes in the number and magnanimity of his follow-"ers; for ſuch are courted by embaſſies, and diſtinguiſhed "with preſents, and by the terror of their fame alone "often diſſipate wars. In the day of battle, it is ſcanda-"lous for the prince to be ſurpaſſed in feats of bravery, "ſcandalous to the followers to fail in matching the va-"lour of the prince. But it is infamy during life, and "an indelible reproach to return alive from a battle "wherein

" wherein their prince was ſlain. To preſerve him, to " defend him, and to aſcribe to his glory all their gallant " actions, is the ſum, and moſt ſacred part of their oath. " For from the liberality of their prince they demand and " enjoy that war-horſe of theirs, and that terrible javelin, " dyed in the blood of their enemies. In place of pay, " they are ſupplied with a daily table and repaſts, though " groſsly prepared, yet very profuſe. For maintaining " ſuch liberality and munificence, a fund is furniſhed by " continual wars and plunder†."

Here, then, are to be ſeen moſt plainly the rudiments of that feudal connection, that afterwards ſubſiſted between the king and all his military vaſſals, and of the oath of fealty which the latter took to him. To his perſon, and to aid him in all he undertook, his companions were bound, during his and their lives, by the ſtricteſt ties; but as to other freemen, who lived apart in their villages, the bonds of allegiance were much more looſe. This rude people had no notion of what almoſt every civilized nation hath laid down as a maxim, that being born in, and protected by a ſociety, creates a durable obligation. They ſerved, indeed, in conſideration of the lands they held, in all defenſive wars; and in all offenſive ones, which either were generally approved of, or in which they choſe particularly to engage themſelves. Nay, ſo great was the notion of particular independence among theſe people, that they thought that all of the freemen or ſoldiers, except the *comites*, who had by oath bound themſelves to the perſon of the king for life, were at liberty to engage in expeditions, that neither the king, nor the majority of the nation conſented to; and that under leaders of their own chooſing.

† De mor. Germ. cap. 13. and 14.

ing. For as, at their general meetings, war was neceſſarily the moſt common ſubject of deliberation, if any one propoſed an enterprize, all who approved the motion were at liberty to undertake it; and if the king declined commanding therein, they choſe a general capable thereof; and when, under his conduct, they had ſucceeded, they either returned, and divided the ſpoil, and became ſubjects of their former king as before; or, if they liked the country they had ſubdued better, ſettled there, and formed a new kingdom, under their victorious leader. *Duces ex virtute ſumunt*, ſaith Tacitus; a practice hard to be accounted for among nations expoſed to continual danger, and which muſt be thereby frequently weakened, on any other ſuppoſition, than that it was firſt introduced to diſburthen a narrow territory, overſtocked with inhabitants. This effect, however, it muſt have had, that their kings were rendered more martial, and obliged equally by their glory and intereſt, to command in every expedition, that was agreeable to any conſiderable number of their ſubjects.

From this cuſtom Monteſquieu very ingeniouſly conjectures, that the Franks derived their right of conferring on their *mairs de palais* the power of war, at a time, when, by the long continued ſlaughters of the royal family, they were obliged to place the crown on the heads of minors, or of princes as incapable as minors; a power that enabled them, by degrees, to uſurp the civil adminiſtration, and at length to transfer the title alſo of royalty to a new race, in the perſon of Pepin *.

Such, then, was the face of a German ſtate. A king choſen for his illuſtrious extraction, attended by a numerous

* L'Eſprit des loix, liv. 31.

rous body of choſen youth, attached to his ſervice in war by the ſtricteſt bonds of fidelity; a number of freemen divided into villages, over each of which was an elective chief, engaged, likewiſe, to military duty, but in a laxer manner; and under all theſe were the ſervants, who occupied the greateſt part of the land, and ſupplied the freemen with the neceſſaries of life.

It is time now to attend a little to their domeſtic policy, and to inform ourſelves what were the rights of each of theſe orders in the time of peace. The king, we are aſſured by Tacitus, was far from being abſolute ‡. He was judge, indeed, among his own peculiar vaſſals, who lived on his demeſne, as the other chieftains were in their reſpective diſtricts. He preſided in their general aſſemblies, and was the firſt who propoſed matters for their deliberation. His opinion had great weight, indeed, from his rank and dignity, but his power was rather that of perſuaſion than of command. The royal family was no otherwiſe diſtinguiſhed from others, than as their perſonal merit acquired influence, or their high birth and capability of ſucceſſion engaged reſpect. The companions of the prince were highly honoured for their faithful attachment to him, and their valourous atchievements in war; but, as to rights and privileges, were on the common footing of other freemen. The only diſtinction was between the chieftains, or lords of the villages, and the vaſſals who were under their juriſdiction. The chieftains were judges in their reſpective diſtricts; but, to prevent partiality, to each of them were aſſigned an hundred perſons, choſen among the populace, to accompany and aſſiſt him, and to help him at once with their authority and their counſel. And this inſtitution was, in all probability, the original of the juriſdiction

‡ De mor. Germ. cap. 7. 12. and 14.

tion of the *pares curiæ* in the feudal law. Another, and a very great check on their chieftains, was their being elective, and conſequently amoveable every year, if their conduct was diſpleaſing either to prince or people. Theſe elections, as well as thoſe of their aſſeſſors, were made in their aſſemblies; where, indeed, every thing of any conſequence was tranſacted, and therefore they deſerve to be particularly treated of.

Theſe conventions, then, unleſs they were ſummoned on extraordinary occaſions, were regularly held once a month, on certain ſtated days; but ſuch was the impatience of this people of controul, or any regularity of proceeding, that Tacitus obſerves, that frequently two or three days were ſpent before they were all aſſembled. For in theſe meetings, every freeman, that is, every ſoldier, had an equal voice. They appeared all in arms, and ſilence was proclaimed by the prieſts, to whom alſo it belonged to keep the aſſembly in order, and to puniſh all diſturbers of its regularity. The king in the firſt place was heard, next ſuch of the chiefs as had any thing to propoſe, and laſtly others, according to their precedence in age, nobility, military virtue, or eloquence. If the propoſition diſpleaſed, they rejected it by an inarticulate murmur. If it was pleaſing, they brandiſhed their javelins; the moſt honourable manner of ſignifying their conſent being by the ſound of their arms. But this approbation of the general aſſemblies was not of itſelf ſufficient to eſtabliſh a reſolution. As the ſudden determinations of large multitudes are frequently raſh, and injudicious, it was found neceſſary to have what they had ſo determined reconſidered by a ſelect body, who ſhould have a power of rejecting or confirming them. For this purpoſe the chieftains were formed into a ſeparate aſſembly, who, in conjunction

junction with the king, either disannulled, or ratified what had been agreed to by the people at large*.

Such then was the constitution of a German kingdom, a constitution so nearly resembling our own at present, as at first view would tempt any one to think the latter derived immediately from thence. Yet this was not the case. With respect to the Saxon times, as far as we can judge from the few lights remaining, the form of government seems very nearly to resemble this account which Tacitus gives us; but, for two centuries, at least, after the conquest, the English constitution wore a face purely feudal. The sub-vassals had long lost the privilege of being members of the general assembly, from causes that shall be hereafter attempted to be explained; and the whole legislative power was lodged in the king and his immediate vassals, whose interests frequently clashing, and creating continual broils, it was found necessary, for the advantage both of the sovereign and nobles, that a proper balance should be formed. Accordingly, much at the same time in France, Spain, and England, namely, in or about the thirteenth century, the happy method of readmitting the third estate, by way of representation, was found out, with an addition very favourable to the natural rights of mankind, that traders and artizans, who before had been treated with the most sovereign contempt, were now permitted to make part of the general assembly, and put on an equal footing with other subjects†.

But

* Ibid. cap. xi.

† Muratori, Antiq. Ital. vol. 4. p. 160. et Seq. Mably, Observations sur l'histoire de France, tom. 2. p. 96. et Seq. Madox, Firma Burgi, cap. 1. sect. 9.

But to return to the aſſembly of German chieftains, or their houſe of lords, as I may call it; beſides a ſhare in the legiſlative power, they were likewiſe a council, to aſſiſt the king in the execution of the reſolutions of the general aſſembly, and determined ſolely by their own authority all matters of leſſer moment, that did not immediately affect the whole community. *De minoribus rebus principes conſultant, de majoribus omnes.*

Many other things were likewiſe tranſacted in theſe general aſſemblies, as particularly the admiſſion of a new member into the political ſociety. When a youth was judged capable of bearing arms, he was introduced by his relations into the aſſembly; and if they teſtified his capacity of wielding them, he was dignified with a lance and javelin by one of the chieftains, or by his father, or ſome other near relation. This was his *toga virilis*. Then, and not before, was he emancipated from the family he belonged to, was permitted to become a ſoldier, and in conſequence admitted to all the privileges of a free ſubject. A practice that, in after ages, gave riſe to the ſolemn and public manner of creating knights*.

This, likewiſe, was the proper place of accuſing criminals of public crimes, namely ſuch as were looked upon by thoſe people particularly to affect the whole ſociety; neither was it unuſual, likewiſe, to bring hither accuſations of private wrongs, if the party injured was apprehenſive of partiality in his own canton.

But the buſineſs of greateſt moment, next to legiſlation, was, that, once in a year, in theſe aſſemblies, each village, with the approbation of the king, choſe their chiefs, and

* Tacit. de mor. Germ. c. 13. Spelman's Gloſſary, voc. Miles.

and their hundred aſſiſtants†. Here it was they either received a teſtimony of their good behaviour, by being continued in office another year, or ſaw themſelves reduced to the rank of private ſubjects, if their conduct had not been acceptable. At the ſame time were the lands diſtributed to the ſeveral chieftains, which leads me to ſay ſomething on the next head, their regulations with reſpect to property; as to which their inſtitutions were very ſingular, and totally different from thoſe of all ancient, as well as modern nations.

All property being then naturally diviſible into two kinds, moveable and immoveable, of the firſt theſe people had but a ſcanty ſhare, their whole wealth conſiſting in their arms, a few mean utenſils and perhaps ſome cattle. The uſe of gold and ſilver, in the way of commerce, was utterly unknown to them, except to a few of their nations, namely ſuch as lived near the Rhine, and had acquired ſome by dealing with the neighbouring Gauls. Conſequently, there was no ſuch thing as an accumulation of wealth among them, or any great diſparity in the diſtribution of this kind of property, over which each had uncontrouled dominion during his life. But as teſtaments, or laſt wills, were unknown amongſt them, upon death, the right went according to the plain dictates of nature. Tacitus ſaith, "To every man his own children were heirs and "ſucceſſors. For want of them, his neareſt of kin, his "own brothers, next his father's brothers, or his mo-"ther's." Whatever there was, was divided among the males next in degree; ſave that to each of the females, a few arms were aſſigned, the only dowry in uſe among thoſe people; a dowry which, as Tacitus ſaith, ſignified that they were to ſhare with their huſbands in all fortunes of life and death.

† Tacit. de mor. Germ. cap. 12.

death. Accordingly, they conſtantly attended them to the field, were witneſſes of their valour, took care of the wounded †; and often, if their party had the worſt, they ran into the ranks, and by their preſence and danger, animated the men to renew the charge.

But with reſpect to real or landed property, the caſe was very different. Here a man had only the uſe, or enjoyment of the profits; and that, too, but a temporary one. The real property, or *dominium verum*, was lodged in the community at large; and was at the end of every year, cantoned out, and diſtributed to the ſeveral tribes of the people; and the portion aſſigned to each was after that ſubdivided to the reſpective individuals; who by theſe means were perpetually removed from one part of the territory to another; nor could any man tell in what place his lot was to fall the next year ‡. And this cuſtom, abſurd as it ſeems to us, they were ſo fond of, as to continue for ſome time after they ſettled in the Roman territories; until, growing by degrees acquainted with the conveniencies of life, a change of manners was introduced, and they wiſhed for more ſettled habitations. Then came into uſe grants for terms of years, after for life, and laſtly, eſtates deſcendible to heirs, which are thoſe we, properly ſpeaking, called

† Hi cuique ſanctiſſimi teſtes, hi maximi laudatores. Tacit. de m. G. c. 7. Conſult alſo c. 5. and c. 18.

‡ It is to be wiſhed, that our ingenious Profeſſor had here entered more at large into the hiſtory of property in land. The ſubject is important and little underſtood. The conceptions entertained by the ancient inhabitants of Germany and Gaul concerning property have been explained and illuſtrated in a book, intituled, "An Hiſtorical Diſſertation concerning the Antiquity of the Engliſh Conſtitution." The author of this treatiſe ſeems to be the firſt who has remarked that land is originally the property of nations, and has attempted to account for the manner in which it comes to deſcend to individuals. See his Diſſert. part 1. ſect. 3. See alſo Profeſſor Millar's valuable work on the Diſtinction of Ranks in Society, p. 165, et ſeq. 2d edition.

called *fiefs*. This continual removal of habitation, ſo intolerable to a people any way accuſtomed to comfortable dwellings, was no manner of inconvenience to them.—Their little ſubſtance was eaſily removed, and two or three days were ſufficient to erect a ſorry hovel, which contented the wiſhes of the greateſt among them †. But their paſſion for this conſtant change of place ſeems derived from that condition which I have already obſerved they were in, namely, a middle ſtate between hunters and ſhepherds; and that they ſtill retained that practice, was an evidence that they had not been long reclaimed from a ſavage life. Tacitus indeed ſays, that, in the intervals of war, they were not much employed in hunting, but lived a lazy and inactive life. This, however, I apprehend, muſt be underſtood only of a few nations, neareſt to the Romans, where game was not ſo plentiful, and not of all the Germans in general: for it is certain the Franks had a ſtrong paſſion that way, after they were ſettled in Gaul; and from them the plan of the foreſt laws, ſo juſtly complained of in England, after the conqueſt, was derived. And true it is, that whole nations, as well as individuals, were poſſeſſed with this rambling inclination; and that, not always with a view of ſettling in a better country. If the Germans changed their barren wilds for the warm ſun and fertile climate of Gaul, we are aſſured by the ſame authority, that many tribes of the Gauls, on the other hand, removed to the foreſts of Germany. If Jornandes tells us, that the Goths quitted the bleak and barren mountains of Scandinavia for the pleaſant banks of the Danube, he likewiſe informs us, that, afterwards, they returned back into their native country.

† Cæſar, de bell. Gall. lib. 4. c. 1. Lib. 6. c. 22. Tacit. de mor. Germ. c. 26.

As to their methods of adminiſtering juſtice, I have already obſerved, that their chieftains, in the ſeveral diſtricts, aſſiſted by their aſſeſſors, were their judges. Before them all cauſes were brought, which were not diſcuſſed in their general aſſemblies; but as to the manner of inveſtigating the truth, all the German nations did not agree. Nay the Salian Franks differed conſiderably from their brethren, the Ripuarian Franks. If the judge, or his aſſeſſors, or any of them, had knowledge of the fact in diſpute, which often happened, as theſe people lived much in public, and in the open air, they gave ſentence on ſuch their knowledge.—This was common to them all; but if there was no ſuch knowledge in any of the *pares curiæ*, as I may call them, and the fact in queſtion was denied, the Salians proceeded thus: The accuſer or plaintiff produced his witneſſes, the accuſed did the like; and on comparing the evidence on both ſides, the judges gave ſentence. If the plaintiff had no witneſſes, the defendant, on his denial, was diſmiſſed of courſe. If the witneſſes for the plaintiff failed in fully proving the point, and yet their teſtimony was ſuch, as induced a preſumption which the other party was not able to remove, the trial was referred to the ordeal†. That of boiling water was the moſt uſual among them. The manner was thus: The perſon ſuſpected plunged his hand into the boiling water, which was afterwards carefully cloſed up, and inſpected at the end of three days: If no ſign of the ſcalding then appeared, he was acquitted; if otherwiſe, he was eſteemed guilty‡.

It is ſtrange that any people ſhould, for ages, make uſe of ſuch a method, which a very little reflection, or common

† Du Cange, Gloſſarium voc. Juramentum. Georgiſch, corp. juris Germanici antiqui.

‡ Spelman, Gloſſ. voc. Lada et Ladare. Struv: Hiſt. jur: criminal: ſect. 9.

mon experience, might eaſily ſatisfy them had no manner of connection with guilt or innocence. But, beſides the groſs ſuperſtition of theſe nations, who thought the honour of providence concerned in the detection and puniſhment of criminals, Monteſquieu hath given us another reaſon for this practice, which, whether juſt or not, for its ingenuity, deſerves to be taken notice of. He obſerves, that the military profeſſion naturally inſpires its votaries with magnanimity, candour, and ſincerity, and with the utmoſt ſcorn for the arts of falſhood and deceit. This trial, then, he imagines calculated to diſcover plainly to the eye, whether the perſon accuſed had ſpent his whole life in the arts of war, and in the handling of arms. For if he had, his hands would thereby have acquired ſuch a callouſneſs, as would prevent any impreſſion from the boiling water, diſcernible at that diſtance of time. He therefore was acquitted, becauſe it was preſumed he would not ſcreen himſelf by a falſhood. But if the marks appeared, it was plain he was an effeminate ſoldier, had reſiſted the force of education, and the general bent of his countrymen; that he was not to be moved by the ſpur of conſtant example, that he was deaf to the call of honour; and conſequently ſuch a perſon whoſe denial could have no weight to remove the preſumption againſt him ‡.

Theſe were the methods of trial among the Salians, but the Ripuarian Franks, the Burgundians, and ſeveral other German nations acted very differently. No witneſſes were produced among them on either ſide, but they contented themſelves with what were called negative proofs; that is, the perſon accuſed ſwore poſitively to his own innocence, and produced ſuch a number of his relations as the cuſtom of the country required: or if he had not relations enough,

‡ L'Eſprit des loix, liv. 28. ch. 17.

the number was made up out of his intimate acquaintance: Theſe were to ſwear that they believed his oath to be true, and upon this he was acquitted. But if he declined the oath, or could not produce a ſufficient number of compurgators, he was found guilty; a practice that fully proves theſe nations were, when this method was introduced, a people of great ſimplicity and ſincerity *.

But as, by this means, every profligate perſon, with the aſſiſtance of a few others as wicked as himſelf, was ſure to eſcape, the defects of this kind of trial introduced another, or rather revived an ancient one, no leſs inconcluſive.—Antiently, the Germans had no judicatures for the deciſion of private wrongs; but each in perſon took his own ſatisfaction, and this introduced perpetual combats. When the new method of trial came in uſe, a party ſeeing his adverſary ready to defeat his juſt demands, and ſcreen his injuſtice with perjury, reſorted to his ancient right, refuſed to accept the oath, and appealed to the providence of God by the trial of battle: a method as abſurd, indeed, as the former, but peculiarly adapted to the way of thinking of the Germans, who frequently, before they entered into a war, prognoſticated the ſucceſs of it from the event of a combat between one of their own nation, and a captive of the enemy †. This kind of trial gained ground among all the deſcendants of this ferocious people ‡, and introduced itſelf at length among the Salians, who had it not at firſt, and who, by admitting poſitive proofs, had no need of it; and, though long fallen into diſuſe, hath left behind, its offſpring,

* Georgiſch, corp. juris Germanici antiqui, p. 347. and p. 368.

† Du Cange, Gloſſ. voc. Duellum. Spelman, voc. Campus, Selden's Duello, or Treatiſe on Single Combat, ch. 5.

‡ Georgiſch, corp. juris Germanici antiqui, p. 980, 1063, 1223, 1267,

offspring, private duelling. It hath been long ſince obſerved, that this faſhionable cuſtom owed its origin to theſe northern nations, the anceſtors of the preſent inhabitants of Europe, as no other nations, antient or modern, however martial or diſpoſed to war, had any knowledge or practice of it: but it is undeniably evidenced by this, that as a lie, above all other provocations, is the ſtrongeſt, and what lays gentlemen of honour under an indiſpenſible neceſſity of duelling, ſo were *you lie* the very words mutually given and received in old times, the accuſtomed form of joining iſſue by battle, after which neither party, without perpetual infamy and degradation from his rank, could recede.

I have taken the more notice of theſe four different methods of trial among the old Germans, as every one of them has been received into England. Concerning the firſt, the trial by witneſſes, little need be ſaid. As it is the faireſt, and the juſteſt, it has accordingly, purſuant to the practice of all civilized nations, prevailed over all the reſt; and it is that, and that only, that we uſe at this day. But the ordeal alſo was in uſe among the Saxons, and continued ſome time after the Norman conqueſt; as appears, not only by the old records of the law, but from the famous ſtory, whether true or falſe, of queen Emma, mother of Edward the Confeſſor, and the plow-ſhares†. The trial by negative proofs, though out of practice, is ſtill in being, in what is called by us the *wager of law*; where, if a perſon is impleaded in an action of debt, on a ſimple contract, he may clear himſelf, by ſwearing he oweth it not, and by producing eleven others, who ſwear to their belief that he has depoſed the truth ‡. Hence it has happened, that, for a long time paſt, *actions of debt*, in ſuch caſes, have not been

† Selden, Analecta Anglo-Britannica, lib. 2. cap. 8.

‡ Brady's Hiſt. of England, p. 65.

been brought, but another, called an *action on the caſe*, is the uſual method, which admits the parties on both ſides, as to the point of debt, *vel non debet* to an examination of witneſſes. For the laſt, the trial by battle, our old books are full of it, in real actions; and although, to prevent the inconvenience and uncertainty of it, the grand aſſize was invented; yet was it in the tenant's, that is, the defendant's option, to chooſe which method of trial he pleaſed. The lateſt inſtance of joining iſſue by battle, I have met with, is in Dyer's Reports, in the beginning of Elizabeth's reign‡; but by this time it was ſo much diſcouraged, that, by force of repeated adjournments, the parties were prevailed on to agree, and judgment was at length given upon the failure of one of the parties appearing on the day appointed for the combat.

When the truth, by ſome of the methods above-mentioned, was aſcertained, judgment was to be given. Here it will be proper to obſerve, that, among theſe people, there were only two kinds of crimes, that were looked upon as public ones, and conſequently capital. The firſt was treaſon, or deſertion in the field, the puniſhment hanging; the ſecond cowardice, or unlawful luſt, for they were ſtrict obſervers of the nuptial band, the puniſhment ſtifling in a moraſs, with an hurdle over them. It ſeems, at firſt view, ſurpriſing, that murder, which Tacitus aſſures us, from ſudden guſts of paſſion, and intemperance in liquor, was very frequent, ſhould not, as it ſo much weakened

‡ Mr. Barrington has remarked, that "the laſt trial by battle in England "was in the time of Charles I. and that it did not end in the actual combat." Obſervations on the Statutes, 3d edition, p. 202. The laſt inſtance which occurs of the judicial combat in the hiſtory of France, was the famous one between M. Jarnac and M. de la Chaiſtaignerie, A. D. 1647. Dr. Robertſon's Charles V. vol. 1. p. 298.

kened the ſtrength of the nation, be conſidered as a criminal offence, and puniſhed accordingly †. But a little reflection on their ſituation will reconcile us to it. The perſon ſlain was already loſt to the ſociety, and if every murder was a capital offence, the ſtate would loſe many of its members, who were its chief ſupporters. Beſides, if the ſlayer had no hopes of mercy, nothing elſe could be expected than his deſertion to their enemies, to whom he could be of infinite ſervice, and to them of infinite detriment, from his knowledge of their ſtrength and circumſtances, and of the paſſes into their country, through the moraſſes and foreſts, which were their chief defence.—Murder, therefore, like other leſſer crimes, was atoned among thoſe people, as it was among the ancient Greeks, who were in pretty ſimilar circumſtances, in the heroic times, as Ajax aſſures us in theſe words, in the ninth Iliad:

Και μεν τις τε καστιγνητοιο φονοιο
Ποινην, η τυ παιδος εδεξατο πεδνηωτος,

namely, by a ſatisfaction of cattle, corn, or money, to the perſons injured, that is, to the next of kin to the deceaſed, with a fine to the king or lord, as an acknowledgment of his offence, and to engage the ſociety to protect him againſt the future attempts of the party offended. Theſe ſatisfactions were not regulated originally, nor fixed at any certain rate, but left to the diſcretion of the injured, or next of kin. However, if he appeared extraordinarily unreaſonable, and refuſed what was judged competent, the ſociety, upon payment of his fine to their head, took the offender into protection, and warranted his ſecurity againſt the attempts of the other party, or his friends. After theſe nations were ſettled in the Roman empire, theſe ſatisfactions for each offence were reduced to a certainty by their laws ‡.

This

† Tacit. de mor. Germ. cap. 12. and 25.

‡ Lindenbrog. Cod. Leg. Antiq. p. 1404. Tacit. de mor. Germ. c. 21 Ll. Wal. by Wotton, p. 192. 194. Ll. Anglo-Saxon. ap. Wilkins, p. 18. 20. 41. Hicheſ. Diſſert. Epiſt. p. 110. Georgiſch, corpus jur. Germ. antiq.

This is as much as I have thought neceſſary to obſerve at preſent, concerning the manners and cuſtoms of theſe people, while they remained beyond the Rhine. It will next be proper to ſee how far afterwards they retained them, and what alterations were introduced by their new ſituation.

LECTURE V.

The decline of the Roman empire—The invaſions of the Northern nations—The manner in which they ſettled in the Roman provinces—The changes inſenſibly introduced among them in conſequence of their new ſituation—The policy and condition of the Franks after they had ſettled in France—The riſe of the feudal law—Eſtates beneficiary and temporary.

IT is full time now to quit the wilds of Germany, to attend theſe nations in their paſſage into the Roman dominions, and to take a view of the manner wherein they ſettled themſelves in theſe new countries. The Roman empire had been long on the decline; but eſpecially, from the time of Severus, it every day grew weaker. This weakneſs, aroſe, in a great meaſure, from an exceſſive luxury, which diſqualified not only their great ones, but the bulk of the Roman people for ſoldiers; and alſo from the tyrannical jealouſy of their emperors, who were afraid of truſting perſons of virtue or ability, and had no other method of ſupporting their authority, than by employing numerous ſtanding armies, that, under them, pillaged and oppreſſed the defenceleſs populace; and laſtly, from the licentiouſneſs of the ſoldiery, who made and unmade emperors according to their wild caprices. Hence proceeded many competitions for that dignity, and continual battles and ſlaughters of their men at arms; the natural conſequence of which was, that whoever prevailed in theſe bloody conteſts, always found himſelf leſs able and powerful

powerful to defend the empire from foreign enemies or domeſtic competitors, than his predeceſſor was †.

About the year 200 after Chriſt, the ſeveral nations who had been hitherto cooped up beyond the Rhine and the Danube, and kept in ſome awe by the terror of the Roman name, began to gather ſome courage from the weakneſs of the empire; and from that time few years paſſed without incurſions into, and ravages of, ſome part of the ſouthern territories, by one or other of theſe people; and how redoubtable they became to that decaying ſtate, may eaſily be judged from the particular fondneſs the emperors of thoſe days had, upon every ſlight advantage gained over them, for aſſuming the pompous titles of Gothicus, Vandalicus, Alemannicus, Francicus, &c. not for the conqueſt, or reducing into ſubjection thoſe ſeveral people, as in antient times, but merely for having checked them, and kept them out of the Roman boundaries ‡.

But theſe invaſions of the northern nations were a long time confined to the ſingle views of rapine and plunder; for as yet they were not fully convinced of their own ſtrength, and the enfeebled condition of their enemies.—And perhaps they might have longer continued in this ignorance, and within their former bounds, had it not been for an event that happened about the year 370, the like to which hath ſeveral times ſince changed the face of Aſia.—I mean a vaſt irruption of the Hunns, and other Tartarian nations into the north of Europe. Theſe people, whether out of their natural deſire of rambling, or preſſed by

† Monteſquieu on the Riſe and Decline of the Roman Empire. Dr. Geddes, in his Tract concerning the Nations which overturned the Empire of the Romans, p. 21—26.

‡ Selden's titles of honour, part 1. chap. 5. § 1.

by a more potent enemy, were determined on a general change of habitation; and, finding the invaſion of the Perſian empire, which then was in its full grandeur, an enterprize too difficult, they croſſed the Tanais, and obliged the Alans and Goths, who lived about the Boryſthenes and the Danube, to ſeek new quarters. The former fled weſtward to Germany, already overloaded with inhabitants; and the latter begged an aſylum from Valens in the eaſtern empire, which was willingly accorded them. The countries ſouth of the Danube were before almoſt entirely depopulated by their frequent ravages. Here, therefore, they were permitted to ſettle, on the condition of embracing the Chriſtian faith; and it was hoped they, in time, would have proved a formidable barrier againſt the incroaching Hunns, and, by a conformity of religion, be at length melted into one people with the Romans. For the attaining this purpoſe, they were employed in the armies, where, to their native fierceneſs and bravery, they added ſome knowledge of diſcipline, the only thing they wanted; and many of their kings and great men were in favour at court, and either ſupported by penſions, or raiſed to employments in the ſtate †.

But the injudiciouſneſs of this policy too ſoon appeared; and indeed it was not to be expected that a people uſed entirely to war and rapine, and unaccuſtomed to any other method of ſubſiſtance, could in a ſhort time be reduced to the arts of ſocial life, and to the tillage of the earth; or be retained in any moderate bounds, in time of peace, when, by being admitted within the empire, they ſaw with their own eyes the immenſe plunder that lay before them, and the inability

† Procop. de bel. Goth. ap. ſcript. Byz. Jornandes, Paulus Warnefridus, Gregory of Tours. Mably, obſervations ſur l'hiſtoire de France, tom. 1. chap. 1.

inability of the Romans to oppoſe their becoming maſters of it. During the life of Theodoſius they remained in perfect quiet, awed by his power and reputation; but when he left two weak minor princes under the guardianſhip of two intereſted and odious regents, it was obvious they could not be bridled much longer. Though, if we are to credit the Roman hiſtorians, their firſt irruption was owing to the jealouſy Rufinus, the prime miniſter of Arcadius, entertained of Stilicho, the guardian of Honorius. This latter, it is ſaid, ambitious of holding the reins of both empires, pretended, that Theodoſius had on his death-bed appointed him ſole regent of both. For, though Arcadius was now of ſufficient age to govern of himſelf, he was, in truth, for want of capacity, all his life a minor. Rufinus, we are told, conſcious of his rival Stilicho's ſuperior talents and power, reſolved to ſacrifice his maſter's intereſt rather than ſubmit to one he ſo much hated; and, accordingly, by his private emiſſaries, ſtirred up both Goths and Hunns, to fall at once on the eaſtern empire†.

In the year 406, theſe nations ſo long irreconcileable enemies to each other, poured their ſwarms in concert into the defenceleſs dominions of Arcadius. The Hunns paſſed by the Caſpian ſea, and with unrelenting cruelty ravaged all Aſia to the gates of Antioch; and at the ſame time the Goths, under the ſo much dreaded Alarick, with no leſs fury, committed the like devaſtations in Illyricum, Macedon, Greece, and Peloponneſus. Stilicho, thinking that his ſaving the eaſtern empire would undoubtedly accompliſh for him his long wiſhed-for deſire of governing it in the name of Arcadius, as he did the weſtern in that of Honorius, haſtened into Greece with a well-appointed army

† Giannone's hiſt. of Naples, lib. 11. cap. 4.

army. But when he had the barbarous enemy cooped up, and, as it were, at his mercy, the weak prince, inſtigated by his treacherous miniſter Rufinus, ſent him orders to retire out of his dominions. The Goths returned unmoleſted to the banks of the Danube, laden with plunder; and Stilicho went back to Italy boiling with rage and reſentment, but he never had an opportunity of wreaking his vengeance on his treacherous rival.

In the next year, Germany, ſurcharged with her own inhabitants, and the nations who fled from the Hunns, and, perhaps, inſtigated by Rufinus, to find work for Stilicho at home, ſent forth her multitudes acroſs the Rhine; and, for three ſucceſſive years, the Suevians, Alans, Vandals, and Burgundians, laid all the open country of Gaul waſte; and, about the ſame time, Conſtantine, a Roman Briton, aſſumed the imperial purple, and was acknowledged by all the Romans of that iſland and Gaul.

The weſtern empire was now utterly diſqualified for defence: Stilicho, the only man whoſe abilities and influence were capable of ſaving the falling ſtate, had been ſuſpected of treaſon in aſpiring to the diadem, and was put to death; and Alarick, having before effectually plundered Greece, was now acting the ſame part in Italy, while Honorius, ſhut up in Ravenna, made but feeble efforts of reſiſtance. Twice was Rome beſieged, once redeemed by an immenſe ranſom, and the ſecond time taken, plundered and burnt. At length theſe calamities a little ſubſided; Conſtantine, the Britiſh uſurper of the empire, died; and all the weſtern Romans again acknowledged Honorius; but the weſtern empire, though ſhe lingered ſome time, had received her mortal wound, and utterly periſhed in leſs than fifty years. The diſtreſſed emperor Honorius granted to the Burgundians, who were the moſt civilized of theſe barbarians,

rians, and had embraced the Chriſtian religion, the country they had poſſeſſed themſelves of, namely, Alſace and Burgundy. The Goths, who were already Chriſtians, but of the Arian perſuaſion, having by this time exhauſted Italy, were eaſily prevailed on, under Ataulphus, Alarick's ſucceſſor, to ſettle in the ſouth-weſt of Gaul, under a like grant; which country had been quitted in the year 410 by the Sueves, Alans, and Vandals, who had over-run all Spain, and divided it into three kingdoms. And thus were two kingdoms formed in the ſouth of Gaul, the new inhabitants of which coming by compact, and under the title of the Roman emperor, behaved afterwards to the ſubjected Romans and Gauls not in the light of brutal conquerors. Though they themſelves retained their own cuſtoms, they indulged theſe in the uſe of the Roman laws, ſuffered them to enjoy a conſiderable portion of the lands, and made no very afflicting diſtinctions between themſelves and their ſubjects.

The Burgundians, particularly, we are informed, took two thirds of the lands, the paſturage and foreſts, with one third of the ſlaves to look after their flocks, and left the remainder to the Romans, who were ſkilled in agriculture. They alſo quartered themſelves in the houſes of the Romans, which naturally produced an acquaintance and amity between the two nations. But one great reaſon, as I apprehend, of the lenity of theſe people to the vanquiſhed (and a ſimilar one will account for the Oſtrogoths and Lombards in Italy, afterwards, following their example, which likewiſe hath been taken notice of with wonder by ſome authors) was their neighbourhood to the Roman empire, which ſtill continued in name in the weſt, and which they might well be afraid of ſeeing revived, under a prince of ability,

ability, if their harſh treatment alienated the conquered people's affections from them †.

But different was the treatment the conquered met with from the Franks, who about this ſame time ſettled themſelves at a greater diſtance from Italy, namely, in Belgic Gaul. The Franks, above moſt of the other German nations, had been for a conſiderable time attached to the Romans, inſomuch that if they did not receive their kings from them, as Claudian tells us they did from Honorius, at leaſt the kings received their confirmation from the emperors; and they continued in this fidelity till the year 407, when they fought a bloody battle with the Sueves, Vandals, and Alans, to prevent their paſſing the Rhine, to invade the Roman territories. But when they found the weſtern empire already diſmembered, they thought it not convenient to lie ſtill, and ſuffer other nations to ſhare the prey entirely amongſt themſelves. The Salians, therefore, took poſſeſſion of the preſent Netherlands, and the Ripuarians to their original country of Mentz and Heſſe, added Treves, Cologne, and Lorrain. Some have thought theſe people had grants from the Roman emperor, in the ſame manner as I have mentioned before concerning the Burgundians and Viſigoths; but I ſhould, with others, apprehend this to be a miſtake; for Ætius the Roman general left the Goths and Burgundians in quiet poſſeſſion of their ſeats, but defeated, and obliged the Franks to repaſs the Rhine, which made them, after the danger was over, return with double fury; and for a long time after they treated the conquered Romans in the ſtile of maſters, and with many afflictive diſtinctions, unknown to their neighbours the Goths and Burgundians ‡.

Many,

† Bouquet, le droit public de France, éclairci par les monumens de l'antiquité, p. 6—10. Monteſquieu, l'Eſprit des loix, liv. 30. chap. 6, 7, 8, 9.

‡ Reliq. Spelm. p. 2—7.

Many, in the firſt heat of victory, they reduced to ſlavery, to a ſervitude very different from what had been before practiſed in Germany, and nearly approaching to what was uſed by the Romans. For whatever property was acquired by theſe ſlaves or ſervants, who in after ages were called Villains, belonged to their maſters, not abſolutely, as at Rome; but the maſters claimed and took poſſeſſion of it, and they (I mean in France) for the enjoyment of what was permitted them, paid a ſtipulated tax called *cenſus*, which was the only tax uſed there in thoſe ancient times. However, they did not employ them in domeſtic drudgery, but ſuffered them to live apart, as the proper German ſervants had done. Their duties were uncertain, in this agreeing with thoſe of the men of war, and differing from thoſe of the middle rank, which I ſhall hereafter mention, and were of the moſt humiliating kind, they being obliged to attend at their lord's ſummons, to carry out dung, remove nuiſances, and do other mean and ſervile offices. The number of theſe ſlaves and villains for centuries perpetually increaſed, from the many wars both foreign and civil, theſe people were engaged in, and the *jus gentium* of thoſe ages, by which all that were taken in war were reduced to ſlavery; inſomuch that, by the year 1000, the number of theſe villains was immenſe, whole cities and regions being reduced to that ſtate*.

This introduction of a new order of men, unknown to the original German policy, and inferior to all others, was of advantage to that which had before been the loweſt, I mean the *ſervants*, as they were called in Germany, or *ſocage tenants*, as they were called in England; for the duties

* Potgieſſer, de ſtat. ſervorum, lib. 2. cap. 1. Monteſquieu, l'Eſprit des loix, liv. 30 chap. 14. Du Cange, voc. Servus.

duties they paid their lords were fixed at a certain rate, which being performed, they were chargeable with no other burdens, and, though no members of the body politic, as having no ſhare in the public deliberations, either in perſon or by repreſentation, were in reality free men. Theſe, with the addition of ſeveral of the captive Romans, who were moſt ſkilful in agriculture, were the ſucceſſors of the old ſervants in Germany; but their numbers, from the cauſes before-mentioned, the perpetual wars, continually decreaſed, great multitudes of them being reduced into the ſtate of villainage*.

The ſoldiers, who were really what compoſed the nation, continued for a longer time pretty much in the ſame ſtate as in Germany; for a whole people do not part with their accuſtomed uſages and practices on a ſudden. They changed their habitations as before, their manner of judicature and adminiſtering juſtice continued the ſame, they met in general aſſemblies as uſual, but, as they were now diſperſed over a more extenſive country, not ſo frequently as formerly. When they were converted to Chriſtianity, which happened under Clovis, who, by uniting all the Franks, ſubduing the Alemans, and conquering conſiderable tracts of country from both the Viſigoths and Burgundians, firſt formed a conſiderable kingdom, it was found exceedingly inconvenient to aſſemble every month. Thrice in the year, namely on the three feſtivals, was found ſufficient, except on extraordinary occaſions; and this method was continued many ages in France and in England. For hundreds of years after the conqueſt, theſe were the moſt uſual and regular times of aſſembling parliaments.

* Spelman reliq. 12, 14, 248. Muratori antiq. Ital. vol. 5. p. 712.

But though things, in general, wore the ſame face as when theſe people remained at home, it will be neceſſary to obſerve, that a change was inſenſibly introducing, the king and the chieftains were daily increaſing their privileges, at the expence of the common ſoldiers, an event partly to be aſcribed to the general aſſemblies being leſs frequent, and conſequently fewer opportunities occurring for the people at large to exert their power; but principally to the many years they had ſpent ſucceſſively in camp, before they thought themſelves ſecure enough to diſperſe through the country. The ſtrictneſs of military diſcipline, and that prompt and unlimited obedience its laws require, habituated them to a more implicit ſubmiſſion to their leaders, who, from the neceſſities of war, were generally continued in command. And it is no wonder that while the authority of the inferior lords was thus every day gaining ſtrength, that of the king ſhould encreaſe more conſiderably. For, probably, becauſe he, as general, was the fitteſt perſon to diſtribute the conquered lands to each according to his merits, he about this time aſſumed to himſelf, and was quietly allowed the entire power of the partition of lands. They were ſtill, and for ſome conſiderable time longer, aſſigned in the general aſſemblies, but according to his ſole will and pleaſure, to the ſeveral lords, who afterwards ſubdivided them to their followers in the ſame manner at their diſcretion; whence it came, that theſe grants were called benefices, and are conſtantly deſcribed by the old writers, as flowing from the pure bounty and benevolence of the lord †.

A power ſo extraordinary in a king would tempt any one, at firſt view, to think that he who had ſo unlimited a domi-

† Bruſſel, uſage des fiefs, liv. 2. Selden's tit. of honour, part 2. cap. 1. § 23. and § 33.

a dominion over the landed property, muſt be a moſt abſolute monarch, and ſubject to no manner of controul whatſoever. It will therefore be proper to make an obſervation or two, to ſhew why, in fact, it was otherwiſe. Firſt, then, the aſcendant the lords had gained over their followers, made it extremely dangerous for the king to oppreſs the lords, leſt it might occaſion, if not a rebellion, at leaſt a deſertion of them and their people. For the bonds of allegiance, except among the companions of the king, as I obſerved before, were not yet fully tied. On the other hand, the intereſt of the lords obliged them to protect their inferiors from the regal power. Secondly, this power of the king, and of his lords under him, was not unlimited in thoſe times, as it may appear to be at firſt ſight, and as it became afterwards. For, though he could aſſign what land he pleaſed to any of the Franks, he could not aſſign any part to any other but a Frank, nor leave any one of the Franks unprovided of a ſufficient portion, unleſs his behaviour had notoriouſly diſqualified him ‡.

But the ſtrongeſt reaſon againſt this abſolute power in thoſe times, is to be drawn from the common feelings of human nature. As abſolute monarchies are only to be ſupported by ſtanding armies, ſo is an abſolute unlimited power over that army, who have conſtantly the ſword in their hands, a thing in itſelf impoſſible. The Grand Seignior is, indeed, the uncontrouled lord of the bulk of his ſubjects, that is, of the unarmed; but let him touch the meaneſt of the janizaries, in a point of common intereſt, and he will find that neither the ſacredneſs of the blood of Ottoman, nor the religious doctrine of paſſive obedience, can ſecure his throne. How then could an elective prince, in theſe northern regions, exerciſe an un-

‡ Mably, obſervations ſur l'hiſtoire de France, liv. 1. chap. 5. and 6.

controuled dominion over a fierce people, bred up in the higheſt notions of civil liberty and equality? One of their old maxims they long religiouſly adhered to, that is, that, in conſideration of their lands, they were bound to ſerve only in defenſive wars; ſo that a king who had engaged in an offenſive one, had every campaign a new army to raiſe by the dint of largeſſes; which if he had no treaſure left him by his predeceſſor, as he frequently had, and which every king by all means was diligent in amaſſing, he ſupplied from the profits of his demeſns, the *cenſus* on his villains, or elſe from foreign plunder †.

But theſe people had not long been ſettled in their new ſeats, before the encreaſe of their wealth, and the comfortableneſs of their habitations, rendered a conſtant removal inconvenient, and made them deſirous of more ſettled aſſurance in their reſidence, than that of barely one year. Hence it came, that many were, by the tacit permiſſion of the king, or the lord, allowed to hold after their term was expired, and to become what our law calls *tenants by ſufferance*, amoveable at any time, at the pleaſure of the ſuperior; and afterwards, to remedy the uncertainty of theſe tenures, grants for more years than one, but generally for a very ſhort term, were introduced. The books of the feudal law, written many hundred years after, indeed, ſay that the firſt grants were at will, then for one year, then for more; but I own I cannot bring myſelf to believe that theſe conquerors, who were accuſtomed in Germany to yearly grants, could be ſatisfied with a tenure ſo precarious as under that of a year, in their new acquiſitions. Theſe grants at will, therefore, which are mentioned in thoſe books, I underſtand to be after their term ended. I mean this

† Gregor. Turonen. lib. 2. cap. 27. Uſage des fiefs, par Bruſſel, liv. 2. cap. 6. Diſſertation on the antiq. of the Engliſh conſtitution, part. 3. § 2.

this only as to the warrior-Franks, for as to the ſocagers and villains, I will readily allow that many of the former, and all the latter, were originally at pleaſure ‡.

About this period, as I gather from the reaſon and circumſtances of the times, was introduced the tenure of caſtleguard, which was the aſſignment of a caſtle, with a tract of country adjacent, on condition of defending it from enemies and rebels. This tenure continued longer in its original ſtate than any other; for by the feudal law it could be granted for no more than one year certain †.

It is time now to take notice of ſuch of the Romans as lived among the Franks, and by them were not reduced to ſlavery. Clovis began his conqueſts with reducing Soiſſons, where a Roman general had ſet himſelf up with the title of a king; and after he had extended his conqueſts over all the other ſtates, the Franks, and ſome other German nations, the Armorici, the inhabitants of Brittany, who, cut off from the body of the empire, had for ſome time formed a ſeparate ſtate, ſubmitted to him on condition of retaining their eſtates, and the Roman laws. Their example was ſoon followed by others. The Gauls who dwelt on the Loire, and the Roman garriſons there, were taken into his ſervice. Thus was the king of France ſovereign of two diſtinct nations, inhabiting the ſame country, and governed by different laws. The Franks were ruled by their cuſtoms, which Clovis and his ſucceſſors reduced into writing; the Romans by the Imperial law. The eſtates of the one were beneficiary and temporary; thoſe of the others were

‡ Lib. feud. 1. tit. 1. Hume appendix, 2. Dalrymple, Eſſay on feudal property, cap. 5. § 1.

† Coke on Littleton, lib. 2. chap. 4.

were held *pleno jure* and perpetual, and now, or ſoon after, began to be called *allodial*. But theſe allodial eſtates were not peculiar in after times to the Romans; for as theſe eſtates were alienable, many of them were purchaſed by the Franks: So that we read, that when Sunigiſila and Gallamon were deprived of the benefices they held as Franks, they were permitted to enjoy their eſtates in propriety. As the Romans were, before their ſubmiſſion, divided into three claſſes, the nobles, the freemen, and the ſlaves, ſo they continued thus divided; the nobles being dignified with the title of *convivæ regis* ‡.

But as it was unſafe to truſt the government of theſe new ſubjects in the hands of one of their nation, the king appointed annually one of his companions, or *comites*, for that purpoſe, in a certain diſtrict; and this was the origin of counties, and counts. The buſineſs of theſe lords was to take care of, and account for the profits of the king's demeſns, to adminiſter juſtice, and account for the profits of the courts; which were very conſiderable, as the Roman laws about crimes being, by degrees, ſuperſeded, and conſequently capital puniſhment in moſt caſes aboliſhed, all offences became fineable, a third of which they retained to themſelves. They alſo, in imitation of the lords of the Franks, led their followers to the wars. For every free Roman, that held four manors, was obliged to ſerve under his count; and thoſe that had more or leſs contributed in proportion. This military duty, together with an obligation of furniſhing the king with carriages and waggons, was all the burden put upon them, inſtead of thoſe heavy taxes and impoſts they had paid to their emperors; ſo that, in this inſtance, their ſituation was much mended, though in

‡ Monteſquieu, l'Eſprit des loix, liv. 30. chap. 13. Du Cange, voc. Alod. Schilteri Theſaur. voc. Alod.

in other reſpects it was ſufficiently mortifying†. The greateſt among them was no member of the political body, and incapable of the loweſt office in the ſtate; and as all offences were now fineable, thoſe committed againſt a Frank, or other Barbarian, were eſtimated at double to the compenſation of thoſe committed againſt a Roman or Gaul. No wonder, then, that *gentilis homo*, a term formerly of reproach among the Romans, (for it ſignified a heathen and barbarian) became now a name of honour, and a mark of nobility; and that the Romans earneſtly longed to turn their allodial eſtates into benefices, and to quit their own law for the Salic. And when once they had obtained that privilege, the Roman law inſenſibly diſappeared, in the territories of the Franks, the northern parts of modern France, which are ſtill called the *pays de coutumes*; whereas, in the ſouthern parts, where no ſuch odious diſtinctions were made by the original conqueror, the Roman law kept its ground, and is to this day almoſt entirely obſerved. Theſe countries are called by the French lawyers the *pays de loi écrite*, meaning the Roman‡.

But we cannot have a compleat idea of the conſtitution of this nation, without taking notice of the clergy, who now made a conſiderable figure among them. Churchmen had, ever ſince the converſion of Conſtantine, been of great conſequence in the empire; but the influence they obtained among the northern barbarians was much more extenſive than what they had in the Roman empire. The converſion of Clovis to the Chriſtian religion was owing

† Heinec. Elem. jur. Germ. lib. 3. § 26. Selden's tit. of hon. part. 2. chap. 1. Spelman, voc. Comites.

‡ Ripuar. L. L. tit. de diverſis interfectionibus, p. 160, 161. ap. Georgiſch, corp. jur. Germ. Du Cange, voc. Faida.

owing to the earneſt perſuaſions of his wife Clotildis, a zealous Chriſtian, and to a vow he made when preſſed in battle, of embracing the faith of Jeſus Chriſt, if he obtained the victory. He and his people in general accordingly turned Chriſtians; and the reſpect and ſuperſtitious regard they had in former times paid to their pagan prieſts, were now transferred to their new inſtructors. The principal, therefore, of them were admitted members of their general aſſemblies; where their advice and votes had the greateſt weight, as well as in the court of the prince; as learning, or even an ability to read, was a matter of aſtoniſhment to ſuch an illiterate people, and as it was natural in ſuch a ſtate they ſhould take thoſe in a great meaſure as guides in their temporal affairs, whom they looked on as their conductors to eternal happineſs. As they were the only Romans (for the churchmen were all of that nation) that were admiſſible into honours, the moſt conſiderable of their countrymen were fond of entering into this profeſſion, and added a new weight to it. But if the ſacredneſs of their function gave them great influence, their wealth and riches added not a little to it. Before the irruptions of the barbarians, they had received large poſſeſſions from the bounty of the Roman emperors, and the piety of particulars. Theſe they were ſure to poſſeſs: but their ſubſequent acquiſitions were much greater. Though theſe kings and their people had imbibed the faith of Chriſt, they were little diſpoſed to follow its moral precepts. Monteſquieu obſerves the Franks bore with their kings of the firſt race, who were a ſet of brutal murderers, becauſe theſe Franks were murderers themſelves. They were not ignorant of the deformity of their crimes, but, inſtead of amending their lives, they choſe rather to make atonement for their offences, by largeſſes to their clergy.

clergy. Hence the more wicked the people, the more that order encreaſed in wealth and power †.

But, to do juſtice to the clergy of that age, there was another cauſe of their aggrandizement, that was more to their honour. As theſe barbarians were conſtantly at war, and reduced their unhappy captives to a ſtate of ſlavery, and often had many more than they knew what to do with, it was uſual for the churchmen to redeem them. Theſe, then, became their ſervants, and tenants, where they met not only with a more eaſy ſervitude, but were, from the ſacredneſs of the church, both for themſelves and their poſterity, ſecured from any future dangers of the ſame kind. It was uſual alſo for the unhappy Romans, who were poſſeſſed of allodial eſtates, and ſaw themſelves in danger, by theſe perpetual wars, of not only loſing them, but their liberty alſo, to make over their eſtates to the church, and become its ſocage-tenants, on ſtipulated terms, in order to enjoy the immunities thereof.

By all theſe means the landed eſtates of the clergy grew ſo great, that in time the military power of the kingdom was much enfeebled: for though they were obliged to furniſh men for the wars, according as the lands they held were liable to that ſervice, this was performed with ſuch backwardneſs and inſufficiency, that the ſtate at one time was near overturned, and it became neceſſary to provide a remedy. Charles Martel, therefore, after having delivered the nation from the imminent danger of the Saracen invaſion, found himſelf ſtrong enough to attempt it. He ſtripped the clergy of almoſt all their poſſeſſions, and, turning them into ſtrict military tenures, divided them among

† Bacon's Diſcourſe on the Laws and Government of England, p. 11.—27. Monaſt. Anglican. paſſim. Mezeray, abr. chronol. tom. 1. p. 172.

among the companions of his victories; and the clergy, inſtead of lands, were henceforth ſupported by tithes, which before, though ſometimes in uſe, were only voluntary donations, or the cuſtom of particular places not eſtabliſhed by law †.

In my next lecture I ſhall conſider the introduction of eſtates for life into the feudal ſyſtem, and take notice of the conſequences that followed from thence.

† Monteſquieu, l'Eſprit des Loix, liv. 30. chap. 21. liv. 31. chap. 9. 10. 11.

LEC-

LECTURE VI.

The introduction of eſtates for life into the feudal ſyſtem—The nature and forms of inveſtiture—The oath of fealty, and the obligations of lord and tenant.

IN the preceding lecture I took notice of the different condition and ſituation of the Romans and barbarians in the infancy of the French monarchy; but it will be neceſſary to obſerve, that all the barbarians themſelves were not ſubject to the ſame laws and regulations. When the Ripuarian Franks, after the murder of their ſovereign, ſubmitted to Clovis, it was under an expreſs condition of preſerving their own uſages. The ſame privilege he allowed to the Allemans, whom he conquered, and to ſuch parts of the Burgundian and Gothic kingdoms as he reduced to his obedience. The cuſtoms of all theſe ſeveral people, as they were Germans, were indeed of the ſame ſpirit, and did pretty much agree; but in particular points, and eſpecially as to the adminiſtration of juſtice, they had many variations; and theſe the ſeveral nations were fond of and ſtudious of preſerving. What was peculiar to theſe people, above all other nations, was this, that theſe different laws were not local, but perſonal: for although the Salians, in general, dwelt in one part of the country, the Ripuarians in another, the Allemans in a third, &c. yet the laws were not confined to theſe diſtricts: but a Salian, in the Ripuarian territories, was ſtill judged by his own, the Salian law; and the ſame was true of all the others. Another peculiarity was, that the barbarians were not confined to live in the law they were born under. The Romans

mans, indeed, could not paſs from their Roman law to that of any one of their conquerors, until they were allowed, ſeveral ages after, to acquire fiefs; but any of the barbarians, if he liked another law better than his own, could adopt it: a privilege, I preſume, derived from that antient practice which they uſed, of removing from one ſtate or commonwealth to another, or of going forth to form a new one.

In the French monarchy, then, there were five different nations, beſides the Romans, governed by five diſtinct laws; but theſe five people, being all of the ſame northern original, and deſcended from the conquerors of Gaul, were, in the ſtate, every one of them eſteemed and regarded on an equal footing, enjoyed the ſame privileges, and equally received benefices from the king or other lords. I have already obſerved, that the bonds between the king and his companions in Germany continued during their joint lives. It had the ſame duration after they ſettled in Gaul; where they either preſided with him in his court, as they had done formerly, or were ſettled in benefices near him, and in ſuch ſituations as they might readily attend him on occaſion; or elſe were the governors and leaders of the free Romans, under the title of counts. But all the grants of lands or offices that they enjoyed were, as yet, but temporary. So that they were *fideles*, or vaſſals, bound by an oath of fealty for life; but there were no fiefs, or feudal tenures, if we may call them by that name, that continued for ſo long a term †.

The introduction of beneficiary grants for life, as is very properly conjectured, was firſt owing to the counts. They had, as I mentioned before, the third part of the pro-

† Lib. 1. Feud. tit. 1. Hanneton, de jur. feud. p. 139. Du Cange, voc. Fideles et Fidelitas.

profits of the courts in their reſpective diſtricts, which made their office not only conſiderable and honourable, but opulent. They lived apart from the other barbarians among the Romans, whoſe allodial property was fixed and permanent. It was natural for them to wiſh the continuance of their lucrative employments, and to make them as perpetual as their obligation of fidelity was; and this they were enabled to attain by the means of the profits they made of their places, and the want of treaſure, which the kings frequently laboured under to ſupport their wars: for offenſive ones they could carry on in no other manner than by ready treaſure. The counts, therefore, by the dint of preſents, or fines, attained, or I may rather ſay, purchaſed eſtates for life in their offices; but theſe eſtates had, at firſt, continuance only during the joint lives of the granter and grantee ‡.

But the matter did not ſtop here. The example was quickly followed by the other barbarians, who were the immediate tenants of the crown, and who now were growing weary of the conſtant, or even a frequent change of habitation. And, in one reſpect, this allowance was of conſiderable advantage to the king, as it created a tie upon them, equally durable with that by which his companions were bound to him, and wore out by degrees that principle they had before retained, that by throwing up what they held from him, they were abſolved from their allegiance. They, therefore, as well as the companions, took the oath of fealty; which, as far as I can find, was taken by none on the continent, whoſe eſtates were leſs than for life; though, in the law of England, it is a maxim, that fealty is incident to every tenure but two, namely, eſtates at will (for they did

‡ Mably, Obſervations ſur l'hiſtoire de France, liv. 1. chap. 6. Du Cange voc. Beneficium.

did not think it reaſonable that a perſon ſhould bind himſelf by oath, in conſideration of what might be taken from him the next day) and eſtates given in frank almoigne, or free alms, that is, to religious houſes, in conſideration of ſaying divine ſervice, and praying for the donor and his heirs; and theſe were excuſed out of reſpect to the churchmen, who were ſuppoſed not to need the bond of an oath, to perform that duty to which they had dedicated themſelves, and alſo becauſe the ſervice was not done to the lord, who gave the land, but to God.

Thus eſtates for life, created by particular grants, went on continually encreaſing in number, till the year 600, by which time almoſt every military tenure, caſtle-guard excepted, was of this nature. And this accounts for the particular regard the feudal, and from it our law ſhews to the tenant of the freehold, and the preference given to him above a tenant for years. For, firſt, his eſtate was, generally, more valuable and permanent, as long terms were then unknown; and, ſecondly, it was more honourable, as it was a proof of a military tenure, and of the deſcent of its poſſeſſor from the old German freemen. For it was a long time after that ſocage lands, in imitation of theſe, came to be granted in the ſame manner, for life. The lords, or immediate tenants of the crown, having, by the means afore-mentioned, gotten eſtates of continuance, and being bound for life to the king, thought it their intereſt likewiſe to connect their tenants as ſtrictly to them, by granting them freeholds alſo; but in the oath of theſe ſub-vaſſals, which they took to their lords, there was an exception of the fealty due to the king, from whom the land was originally derived, or of a former lord, if ſuch an one they had, to whom they were bound by oath before. Theſe ſub-vaſſals, likewiſe, had not in thoſe early times, the

power

power of creating vaſſalages, or eſtates for life, under them; for it was thought improper to remove the dependence of any military man on the king to ſo great a diſtance; and indeed it was hardly worth any man's while, if it had been lawful, to accept ſuch a gift as was determinable either on the death of the ſuperior lord, or of his vaſſal, who had granted it, or laſtly, on his own death *.

Eſtates for life being now become common, and in high eſtimation, it was thought proper that they ſhould be conferred with more form and ſolemnity, and that by means of what the feudal law calls Inveſtiture, of which there are two kinds. The firſt, or proper inveſtiture, was thus given: The lord, or one impowered by him, and he that was to be tenant, went upon the land, and then the tenant, having taken his oath of fealty, the lord, or his deputy (or attorney, as our law calls him) gave actual poſſeſſion to him, by putting into his hand a part of the premiſes, in the name of the whole, as a turf, a twig, or a haſp of the door, in the preſence of the *pares curiæ*, that is, of the other vaſſals or tenants of the lord. This is what our law calls giving livery and ſeizin, from the lord's or his deputy's delivering, and the tenant's taking ſeizin, for ſo the poſſeſſion of a freehold or eſtate for life is called.—The preſence of the *pares curiæ* was required equally for the advantage of the lord, of the tenant, and of themſelves; of the lord, that, if the tenant was a ſecret enemy, or otherwiſe unqualified, he might be appriſed thereof by the peers of his court, before he admitted him; and that they might be witneſſes of the obligation the tenant had laid himſelf under of doing ſervice, and of the conditions annexed to the gift, if any there were, which the law did not imply:

* Spelman's Gloſſ. voc. Feodiem. Dalrymple on Feudal-Property, chap. 1. Hume, Append. 2.

imply: for the benefit of the tenant, that they might teſtify the grant of the lord, and for what ſervices it was given; and laſtly, for their own advantage, that they might know what the land was, that it was open for the lord to give, and not the property of any of the vaſſals; and alſo that no improper perſon ſhould be admitted a par, or peer of their court, and conſequently be a witneſs, or judge, in their cauſes †.

Hence it is, that in our law, if a man has right to enter into ſeveral lands in the ſame county, an entry into one of them, in the name of all, is ſufficient to veſt the ſeizin, that is, the poſſeſſion of the freehold of all, in him; becauſe the ſame *pares curiæ* (who were in antient times the only witneſſes allowed) who know he had in their preſence entered into one, know alſo that he entered that one in the name of all the others; but if the lands lie in different counties (which are diſtinct juriſdictions, and have different *pares curiæ*) an entry into one county, in the name of the whole, is not ſufficient; becauſe, as to ſeizin of lands in the other county, the *pares* thereof are the only competent witneſſes.

As the proper inveſtiture required the actual going upon the lands, which was often inconvenient, the improper inveſtiture was introduced. This, which was the ſecond kind mentioned, was alſo performed in the preſence of the *pares curiæ*, thus: The intended tenant, in a moſt humble and lowly manner, prays the grant of ſuch an eſtate from his lord; which, when the latter has agreed to, he inveſts him, by words ſignifying his grant, and what it is of, accompanied by ſome corporeal action, as delivering him a ſtaff,

† Du Cange. voc. Inveſtitura. Spelman, voc. Pares Curiæ. Craig de feud. lib. 2. dieg. 2.

ſtaff, a ring, a ſword, or clothing him with a robe, which laſt, being the moſt common method amongſt the great immediate tenants of the king, gave riſe to the name *inveſtiture*. After this, the tenant did fealty. But this improper inveſtiture did not transfer the actual poſſeſſion of the land without ſubſequent livery and ſeizin, and gave the tenant not a right to enter, but only a right of action, whereby he might ſue, and oblige the lord to transfer it by an actual livery. For all theſe lands, being liable to ſervices ariſing out of the profits for which the lord was bound to anſwer to the king, his poſſeſſion of theſe profits by their rules was continued, until he had, by an act of public notoriety, namely, by giving livery and ſeizin on the land, put it out of him. And this maxim was, I apprehend, eſtabliſhed alſo for the benefit of the co-vaſſals, who could better judge by their own eyes, on the ſpot, whether an injury was done by the grant to any of them, than by hearing the lands named and deſcribed elſewhere, as, in ſuch caſe, it frequently happened that all the vaſſals were not preſent *.

Hence, if the lord had granted lands by an improper inveſtiture to A, and had afterwards, by livery and ſeizin, granted them to B, they became B's, though he was the later inveſted; and the remedy A had againſt the lord was not for the lands themſelves, for thoſe he had already legally parted with to B, and could not recal, but for their value, in conſideration of his having bound himſelf to fealty.

This was the form and manner of proper and improper inveſtitures in the early times, before theſe barbarians had

* Bracton, lib. 2. cap. 17. Spelman, voc. Fidelitas, et Seiſma. Fleta, lib. 3. cap. 15.

learned the uſe of letters, and was intended not merely for ſolemnity, but alſo to create ſuch a notoriety of the fact, as it might eaſily be proved by *viva voce* teſtimony. For if it was denied, the tenant produced two or more of the *pares curiæ*, each of whom ſwore he had either been preſent at the inveſtiture himſelf, or had conſtantly heard his father declare, that he was. And this, at firſt, was the only evidence admiſſible, and was abundantly ſufficient, when the grants were only for one life. Such proof, however, could not be of any advantage to the church; for, though churchmen die, the church doth not, but continues to be repreſented in a ſucceſſion of natural perſons. If ſhe, therefore, had not a more permanent evidence to produce than what I have before-mentioned, ſhe could never, after ſome length of time, aſcertain her rights. On this account *brevia teſtata*, or, as we call them, deeds, were made uſe of, which were written inſtruments, expreſſing the grant, and its nature, atteſted by ſome of the *pares*, and authenticated by the ſeal of the lord, or by his name and ſign of the croſs. When this kind of evidence was once introduced, as it was more fixed and certain than the frail memories of men, it became cuſtomary for the tenant, who had been inveſted either properly or improperly, to demand and obtain a *breve teſtatum* of that inveſtiture, and afterwards other ſymbols in improper inveſtitures went out of uſe, and the delivery of a deed became the ordinary ſign; but this, as all other improper inveſtitures, required a ſubſequent actual livery and ſeizin.

Having thus delivered the ancient and proper method of conſtituting an eſtate for life, let us attend to the conſequences, and ſee what were the ſeveral rights and obligations of the lord and tenant, and for that purpoſe examine the oath of fealty.

The

The general oath of fealty on the continent was thus: *Ego N. vaſſallus, ſuper hæc ſancta Dei evangelia, juro, quod ab hac horâ in antea uſque ad ultimum vitæ meæ diem, tibi M. domino meo, fidelis ero, contra omnem hominem, excepto ſummo pontifice, vel imperatore, vel rege, vel priore domino meo,* as the caſe was. In England, Littleton gives this account of it. When a freeholder doth fealty to his lord, he ſhall hold his right hand on a book, and ſhall ſay thus: KNOW ye this, my lord, that I ſhall be faithful and true unto you, and faith to you ſhall bear, for the lands which I claim to hold of you; and that I ſhall lawfully do to you the cuſtoms and ſervices which I ought to do, at the terms aſſigned; ſo help me God, and his ſaints; and he ſhall kiſs the book †.

The only differences are, that the words *ab hac hora in antea uſque ad ultimum vitæ meæ diem* are omitted: for abroad none but tenants for life ſwore fealty. In England termers for years did; and that *contra omnem hominem, excepto, &c.* though implied, is likewiſe omitted; which exceptions, however, in the Engliſh law, were inſerted in the doing of homage which the tenant in fee did to his lord.

Such was the general oath of fealty; but to ſhew what *being faithful and true*, and *bearing faith* comprehends, it will be proper to inſert, from the ſeventh title of the ſecond book of the feudal law, the larger oath, which perſons, rude and ignorant of what the word fealty implied, were to take. It runs in theſe words: *Ego juro, quod nunquam*

† Spelman, Gloſſ. p. 266. Feud. lib. 2. tit. 6. Littleton, lib. 2. chap. 2. Baſnage, coutume reformée de Normandie, tit. Des fiefs et droits Feodaux, art. 107.

quam ſcienter ero in conſilio, vel in facto quod tu amittas vitam, vel membrum aliquod, vel quod tu recipias in perſonâ aliquam læſionem, vel injuriam, vel contumeliam, vel quod tu amittas aliquem honorem quem nunc habes, vel in antea habebis; & ſi ſcivero, vel audivero, aliquo, qui velit aliquod iſtorum contra te facere, pro poſſe meo, ut non fiat impedimentum præſtabo. Et ſi impedimentum præſtare nequivero, quam cito potero, tibi nunciabo; & contra eum, prout potero, auxilium meum tibi præſtabo; & ſi contigerit, te rem aliquam quam habes vel habebis injuſte vel fortuito caſu amittere, eam recuperare juvabo, & recuperatum omni tempore retinere. Et ſi ſcivero te velle juſte aliquem offendere, & inde generaliter vel ſpecialiter fuero requiſitus, meum tibi ſicut potero, præſtabo auxilium. Et ſi aliquod mihi de ſecreto manifeſtaveris, illud, ſine tuâ licentia, nemini pandam, vel per quod pandatur faciam; & ſi conſilium mihi ſuper aliquo facto poſtulaveris, illud tibi dabo conſilium, quod mihi videtur magis expedire tibi; & nunquam ex perſona mea aliquod faciam ſcienter, quod pertineat ad tuam vel tuorum injuriam vel contumeliam.

Beſides the negative obligations, of doing nothing to the prejudice of the lord or his family, the poſitive ones the vaſſals lay under may be reduced to the two heads of counſel and aid; which, with us, are ſtill the principal duties that the parliament, who are, or repreſent the vaſſals of the king, owe to the ſovereign. Under counſel, not only giving faithful advice, but keeping his ſecrets was included. Aid may be either in ſupporting his reputation and dignity, or defending his perſon or property. Under the firſt, the vaſſal was not only to ſhew him the higheſt reverence, but was forbid to accuſe or inform againſt him, except in the caſe of treaſon, where the ſupreme lord was concerned.—He could not in a ſuit between them tender to his lord the oath of calumny, whereby he ſhould be obliged to ſwear he

he thought his cauſe was juſt, and that he did not carry it on with an intent to harraſs and diſtreſs; for this was throwing an aſperſion on his lord's character. He could not, for the ſame reaſon, bring any action againſt him, whereby he might be defamed, and particularly the interdictum *unde-vi*, which was a charge againſt the perſon ſued, of an unjuſt and violent diſpoſſeſſion of property. Neither could he, in any cauſe that was not ſtrictly feudal (for in ſuch as were for the general preſervation of that polity, he was permitted) bear witneſs againſt him. And, laſtly, he was obliged to ſupport his dignity, to attend his courts, and do ſuit and ſervice, as a witneſs and a juror.

By aid to his perſon, he was not only obliged to defend his lord, if attacked perſonally, but to aſſiſt him in his wars, and that at his own expence, out of the profits of his tenancy; and if, in the field of battle, he deſerted his lord, before his lord was mortally wounded, it was an abſolute forfeiture. But this aid he was not obliged to give until required; for perhaps the lord did not need the aid of all his tenants; and the vaſſal, without notice, was ſuppoſed ignorant that there was any occaſion for his aſſiſtance, unleſs it could be proved the vaſſal knew his lord's danger, when the lord himſelf did not; or that he knew it was ſo imminent as not to give the lord time to ſummon him; in which two caſes, he was obliged to ſerve without requiſition †.

But here ſome diſtinctions muſt be taken notice of as to the nature of theſe wars. I have often repeated that the king's companions were bound to aſſiſt him in all his undertakings, offenſive or defenſive; and that the other freemen were obliged only to ſerve in defenſive wars. But now, by this new introduction of grants for life to the freemen,

† Coke on Littleton, book 2. chap. 1. Du Cange, voc. Vaſſaticum. Wright on tenures, p. 55, 56.

men, the caſe was altered. In all defenſive wars, they were obliged to aid their lord, though he had been the unjuſt aggreſſor, and this for the preſervation of the ſociety to which they belonged; but in offenſive ones, it was to be conſidered whether the cauſe was juſt, or doubtful, or notoriouſly unjuſt. In the two firſt caſes, he was obliged to furniſh his aid; for if his lord's quarrel was doubtful, the reſpect and reverence he owed him, and his regard to his lord's character and dignity, laid him under a neceſſity of preſuming in his ſuperior's favour. But if the war was notoriouſly unjuſt, he was at liberty to ſerve, or not, as he pleaſed. And the aid he was bound to give, where he was bound, was againſt all perſons, *contra omnem hominem*, even his parents, brothers, children, and friends, with the following exceptions. Firſt, not againſt the king, who was the ſupreme lord of the whole, and in whoſe preſervation and dignity every individual was concerned. Secondly, not againſt himſelf, for ſelf-preſervation is the firſt law of nature. Thirdly, not againſt his original country, though he had received a grant from a foreign lord, and afterwards war broke out between them: for by this time, the opinion of a durable obligation to the ſtate he was born in, began to prevail among them. Laſtly, not againſt his antienter lord, when he had grants from two; for the ſecond obligation could not annul the firſt. It may here be naturally aſked, how ſuch a vaſſal, who had two lords, was to act in caſe of a war between them? If his firſt lord's cauſe was juſt or doubtful, he was undoubtedly bound to him againſt the ſubſequent one, even in attacking him; and this was no forfeiture, for the ſecond lord had ſufficient notice of his prior obligation, by the exception in the oath of fealty. Indeed, if he, having a lord before, had omitted the exception, he juſtly loſt his fief, for the deceit put on his latter lord. But if his firſt lord's cauſe was notoriouſly unjuſt, he was not at liberty

liberty to aſſiſt him againſt the ſecond; but by the two bonds was obliged to remain neuter *.

This military duty was to be done in the vaſſal's proper perſon, if he was capable of it; unleſs the lord was pleaſed to accept of a deputy. But if he was incapable himſelf, as often muſt have happened, after eſtates for life came in, he was allowed to ſerve by a ſubſtitute, ſuch as the lord approved. Suppoſe, then, a man had two lords, who were at the ſame time at war with others, and each required his perſonal aſſiſtance, it was plain he was obliged to ſerve both, the elder lord in perſon, becauſe his right was prior, and the laſt by deputy †.

The aids due to the lord, in reſpect of his property, were, firſt, to aid and ſupport him, if reduced to actual indigence, and to procure his liberty, by paying his ranſom, if taken in war. It was a doubt among the feudal lawyers, whether, if the lord was impriſoned for debts, his tenants were obliged to releaſe him; and the better opinion was, that they were, if the debts did not tend to their very great impoveriſhment ‡.

Theſe were all the aids neceſſarily required by the law in theſe antient times. For thoſe for making his eldeſt ſon a knight, and marrying his elder daughter, came in afterwards. All other contributions and aſſiſtances were merely voluntary, though very frequent, and were originally, as they are ſtill here, and are ſtill called abroad, though impoſed really and truly, *free gifts*.

We

* Feud. lib. 2. tit. 23. and 24. Dalrymple on Feud. property, chap. 2. Wright on tenures, p. 72.

† Madox, Antiquities of the Exchequer, vol. 1. p. 653. Coke on Littleton, lib. 2. chap. 3.

‡ Du Cange, voc. Auxilium. Madox, Antiq. Excheq. chap. 15.

We are now to ſpeak of the duty of the lord to his vaſſals; and on this head there is no need of enlarging much: for it was a maxim in the feudal law, that though the vaſſal only took the oath to the lord, and the lord, on account of his dignity, and the reſpect due to him from the tenant, took none; yet was he equally obliged as if he had taken it, to do every thing, and forbear every thing, with reſpect to his tenant, that the vaſſal was with reſpect to the lord; ſo that the bond was in moſt reſpects ſtrictly mutual; but not in all, for the lord was not obliged to ſupport his indigent tenant, or to give aids to him; but, on the other hand, he was obliged to warrant and defend the lands he had given to his tenant by arms, if attacked in open war, and in courts of juſtice, by appearing upon his voucher, that is, the tenant's calling him in to defend his right, and if the lord failed, he was bound to give lands of equal value, or, if he had not ſuch to beſtow, to pay to the tenant (in conſideration of the bond for life, he had bound himſelf to his lord in) an equivalent in money.

As, in the caſe of the vaſſal's failure in his duty, the lands returned to the lord, ſo, in caſe of the lord's failure on his ſide, the lands were veſted in the vaſſal, free from all ſervices to his immediate ſuperior. But to the king, or lord paramount, he ſtill owed ſervice, in proportion to his fief; and by this means he might become, inſtead of a ſub-vaſſal, an immediate vaſſal of the king †.

Having mentioned the obligations on each ſide between lord and tenant, it next follows to ſee what intereſt each had in the lands given; on which head I ſhall be brief, as theſe ſeveral rights were not ſo nicely diſtinguiſhed as in after

† Feud. lib. 2. tit. 25.

after ages, when theſe tenures became hereditary. The lord was then to ſuffer his tenant to enjoy the iſſues and profits of the lands, he rendering the ſervices due by the reſervation of law, and the additional ones, if any ſuch had been ſpecially reſerved. In caſe of failure, he had, in thoſe antient times, a right of entry for the tenant's forfeiture. For while this military ſyſtem continued in its full vigour, the ſmalleſt breach the vaſſal committed in his engagements was an abſolute forfeiture; but in after times, when the lands were often given upon other conſiderations than military ſervice; and when the military was often commuted for pecuniary conſiderations, a milder way was found out, that is, by *diſtreſs*, by which the lord, inſtead of ſeizing the lands, took poſſeſſion of all the goods and chattels of his tenants found upon the lands, (for the lands were ſtill the mark where he was to take), and kept them as a depoſit, till his tenant had made ſatisfaction, originally indeed at the lord's pleaſure, for the failure in his duty †.

The right the tenant had in the land was, that, paying the ſervices due, he ſhould receive the produce thereof, and turn it to his own beſt advantage; and that he might, if attacked in a court of juſtice, vouch, or call in his lord to defend his poſſeſſion by arms, or otherwiſe. But as his tenure was precarious, and only for life, he was prohibited from doing any thing that ſhould either hurt his lord's intereſt, or that of the king, in whom and his ſucceſſors the inheritance was veſted. Thus, he could not commit waſte, by deſtroying houſes, or cutting down trees, except what was neceſſary for immediate uſe, for repairs, firing, or tillage. He could not bequeath his tenancy, for he held only

† Bracton, lib. 3. p. 130. Spelm. voc. Eſcheata. Glanville, lib. 7. cap. 17. Dalrymple on feud. property, p. 62. Ed. 1757. Hengham Parva, chap. 6. Coke on Littleton, b. 1. chap. 1.

only during life. He could not alienate without the conſent of his lord, for he had his lands in conſideration of his perſonal ſervice; and although, in caſe of neceſſity, he was allowed a ſubſtitute, it was only ſuch an one as was acceptable to the lord; whereas by alienation, the real tenant who was bound by oath to do the ſervices out of the profits, was to loſe them, and a ſtranger, perhaps an enemy, who was under no tie to the lord, was to enjoy them. Alienation, therefore, without the conſent of the lord, was unlawful. If he conſented indeed, and accepted the alienée, he, upon his taking the oath of fealty, became the real tenant, and the former was quit of all poſitive ſervice, except honour and reverence; but ſtill bound by his former oath from doing or ſuffering any thing to the prejudice of his former lord. Neither could a ſub-vaſſal, in thoſe early times, create a vaſſalage to be held of himſelf. The immediate vaſſal of the king, indeed, could, but then it was on theſe terms; firſt, that the perſon he granted it to was one that was of the ligeance of the king, either natural or adopted; next, that he was as capable of rendering the ſervices as the grantor; and laſtly, that the ſervices reſerved ſhould, if not better, which was expected, be at leaſt equally beneficial to the ſupreme lord as thoſe of the original grant to the intermediate or meſne lord. To explain this, if the king granted ten thouſand acres to his immediate vaſſal, for the ſervice of ten knights, the vaſſal might give one thouſand, indeed, or any leſſer number of acres to one perſon, for the ſervice of one knight; but if he gave more to one, as he had attempted to hurt and leſſen the benefit his ſuperior had ſtipulated for, his grant was void, and in thoſe times, when forfeitures were regularly exacted, the grant of the king to him was forfeited alſo †.

In

† Craig, de feud. lib. 2. dieg. 207.

In my next lecture I ſhall ſay ſomething of *improper feuds*, as they began to be introduced about the time I am now upon, and were very ſeldom, in thoſe ages, granted for longer terms than for years or lives, and go on to ſhew by what means, by what ſteps and degrees, eſtates for life grew up into inheritances.

LEC-

LECTURE VII.

Improper feuds or benefices—Grants to the Church—Grants in which the oath of fealty was remitted—Grants to which a condition was annexed, that enlarged or diminiſhed the eſtate—Grants which reſerved certain other ſervices, beſide military ſervice—Grants implying ſome certain ſervice, as rent, and not reſerving military ſervice—Grants reſerving no ſervices, but general fealty—Grand ſerjeanty—Petty ſerjeanty—Grants to women—Grants of things not corporeal—Feudum de Cavena—Feudum de Camera.

HAVING, in the preceding lecture, laid down the manner of conſtituting a proper beneficiary eſtate for life, which conſiſted in lands granted for the defence of the ſtate, upon the conſideration of perſonal military ſervice, and the rights and obligations annexed thereto; it will be proper to mention ſuch, (and to point out the ſeveral kinds of them) as are called improper benefices, which are thoſe that, in one or more particulars, recede from the ſtrict, and, in antient times, the uſual nature of thoſe grants; and this is more eſpecially neceſſary, as, ſince the aboliſhing the military tenures in Charles the Second's time, all our preſent eſtates come under one or other of theſe heads. It was a maxim in the feudal law, that *conventio modum dat donationi*; and therefore, whatever terms the donor preſcribed, though varying from the general courſe, was the rule by which the grant was to be regulated.

In

In the firſt place, then, all benefices granted to the church were improper ones, becauſe given on other terms than that of military ſervice, and becauſe they ended not with the death of the grantor or grantee, but continued coeval with the life of the church, that is, for ever †.

Secondly, Grants of lands, wherein the oath of fealty was remitted; for though fealty itſelf was an incident, eſſential to, and inſeparable from, every eſtate of life abroad, and every eſtate of years alſo in England, the ceremony of actually taking the oath might be omitted; and if the lord had put the tenant in poſſeſſion, without his having taken the oath, the tenant might enjoy without it. He was obliged, indeed, to take it whenever his lord called upon him, on pain of forfeiture; unleſs, in the inveſtiture, it had been expreſsly remitted; in which caſe, he might refuſe to take it, and juſtify his refuſal by the tenor of his inveſtiture ‡.

Thirdly, All grants to which there was a condition annexed, that either enlarged or diminiſhed the eſtate; as if lands were granted to two, and the ſurvivor of them. This was an improper benefice, as it had continuance for more than one life; or if they were granted to a man for life, provided he did, or refrained from doing ſuch an act. This was improper alſo, becauſe it might have a more ſpeedy determination.

Fourthly, All grants, in which certain ſervices beſide military were reſerved, were alſo of this nature, as if the tenure was by military ſervice and a certain rent, or any other certain duty, or by military ſervice reduced to a certainty,

† Craig, de feud. lib. 1. dieg. 11. and 12. ‡ Ibid.

tainty, as to attend, ſuppoſe forty days and no more, or by military ſervice with a power in the tenant to excuſe himſelf, by paying a certain ſum. For the proper fief was for military ſervice only, the occaſions and duration of which were uncertain‡.

Fifthly, If military ſervice was not reſerved at all, but ſome other certain ſervice inſtead thereof, as rent, the grant was an improper one, and ſuch are our tenures, ſince they have been reduced to ſocage, which is derived from *ſoke* or *ſoka*, a plough, becauſe their duty was originally to attend a certain number of days to plow their lord's grounds, or elſe to ſupply him with a certain quantity of corn in lieu thereof. This manner of paying in kind, namely, by corn, cattle or other neceſſaries, was continued every where many ages; in England, until the time of Henry the firſt, when they began to be commuted into money, to the great advantage of the ſucceſſors of theſe ſocage tenants, whoſe eſtates were before become hereditary. For the computation being made at the rate and proportion of value between money and the neceſſaries of life at that time, as money grew more plentiful every day, its value continually ſunk, and the price of commodities accordingly increaſed; in ſo much that the preſent ſucceſſor of a tenant at that time, who had before paid a fat ox, which was changed into twenty ſhillings, its then value, would now pay but the eighth part of the original reſervation, when the price of an ox is eight pounds. And this contributed not a little to the happy equality which now reigns among all ranks, as theſe baſer, the ſocage tenures, were continually riſing in value, and conſequently in conſideration, and coming every day nearer to an equality, in

‡ Ibid.

in the eſtimation of the world, with the nobler, the military benefices †.

Sixthly, If no ſervices at all were reſerved, except general fealty, which could not be remitted; for it was thought reaſonable, not only to grant lands in conſideration of future military ſervice, but alſo to reward ſuch as had deſerved eminently, and were perhaps maimed or mutilated, and ſo unfit for future ſervice, with lands free from ſuch, or any other duty.

Seventhly, Grand ſerjeanty is a benefice of an improper nature, even though it be reckoned a military one, becauſe it is reduced to a certainty. Grand ſerjeanty is a certain ſervice done by the body of a man to the perſon of the king, and is of two kinds; military, which is to be done either in or out of the realm; and not military, which is to be done within the realm. Military, as when lands are given on condition of carrying the banner of the king, or his lance, or to lead his army, that is, to be his conſtable; or to number and array his army, that is, to be his marſhal; but theſe being *certain* ſervices, and due to the perſon of the king, they were not obliged to attend, but where he went in perſon; and this right they inſiſted on ſo ſtrongly, as had almoſt occaſioned a rebellion in the time of Edward the Firſt; who, although in moſt things an excellent prince, was of an hot and haughty temper ‡.

Having determined to attack France on two ſides; in Flanders, where he intended to command himſelf, and in Guienne;

† Reliq. Spelm. p. 3, 7, 33, 43. Gervaſ. de Tilb. Dialog. de Scaccar. lib. 1. cap. 7. Madox, Antiq. Exchеq. vol. 1. p. 272.

‡ Forteſcue de Laud. leg. Angl. p. 99. Ed. 1737. Coke on Littleton, b. 2. chap. 7.

Guienne; he ordered the Earl of Hereford, high conſtable by tenure, and the Earl of Norfolk, marſhal by tenure, to lead the army in Guienne, as his generals and commanders in chief. But, however honourable and pleaſing in other reſpects the offer might be, they feared that ſuch a precedent, quietly complied with, might be, in after times, a means of introducing new and hard ſervices at the king's pleaſure, inſtead of the antient and known ones. They, therefore, flatly refuſed, unleſs he went thither himſelf; offering, at the ſame time, to ſerve under him in Flanders. The king, boiling with reſentment againſt France, and provoked at this contradiction to his pleaſure, however juſtly founded, threatened Norfolk, in a tranſport of paſſion, with hanging; to which the other replied, with equal fierceneſs, and total want of reſpect. The two Earls retired to their eſtates, put themſelves in a ſtate of defence, and even committed ſeveral outrages againſt the king's collectors; and their cauſe was generally eſpouſed by the nation, who were againſt the king's exacting any new and unheard-of ſervices. The behaviour of theſe lords to their ſovereign, and to ſuch a ſovereign, in ſetting him at defiance, and that with terms of diſdain, when they themſelves were the aggreſſors, was utterly unjuſtifiable; but, from their cauſe, notwithſtanding this behaviour of theirs, being univerſally eſpouſed by the nation, we may clearly ſee the opinion and judgment of thoſe times; that their kings were not unlimited, and that they had no right to exact from their vaſſals any ſervices but thoſe that flowed from their tenures. The king, indeed, at firſt gave their lands and offices to others; but when he had cooled, and found they had inſiſted on no more than was their right, he, in the frankeſt manner, repaired his error. He gave in parliament a new confirmation of Magna Charta. By another ſtatute, he renounced all right of taking talliages, that is, levying taxes, even on his own demeſnes, without

out conſent of parliament, as contrary to that charter; and in the body of this laſt act, in the ampleſt manner, remitted all diſguſt and reſentment againſt the two earls and their aſſociates; and gave them the fulleſt indemnity for the offences they had ſo outrageouſly committed. Such conduct in any king, whoſe ſubjects were not diſpoſed to eſteem him, might have been as a ſign of weakneſs, and have been attended with diſmal conſequences; but in Edward's realms there was not a man that did not admire his wiſdom, adore him for his valour, his honour, and his ſincerity. He could encroach without incurring hatred, and he could retract without being thought mean; ſo that it may be a queſtion, whether, by the noble manner of his repairing his miſtake, he did not tie his ſubjects to him with ſtronger bonds of affection, than if he had never committed it †.

The grand ſerjeanties that are not military are of various kinds, being offices and ſervices done to the perſon of the king within the realm, in order to the ſupport of his ſtate and dignity; for which reaſon, although they are not, properly ſpeaking, military ſervices, yet they are looked upon in that light, and are endowed with the ſame privileges, and ſubject to the ſame regulations, except in a few inſtances, to be hereafter mentioned; ſo that no perſon under the rank of the leſſer nobility, that is, of knighthood, was capable of performing them; and therefore, when, by allowing the alienation of lands, theſe tenures fell into the hands of perſons of inferior quality, they were either knighted, or appointed a deputy of that rank. Thus, at the coronation of Richard the Second, as we find in Lord Coke, William Furnivall claimed to find a

† Carte, hiſt. of England, vol. 2. p. 169. The reign of Edward I. in Kennet's collect of Engliſh hiſtorians, p. 197.

globe for the right hand of the king, and to ſupport his hand on the day of his coronation, in virtue of the manor of Farnham, which he held by that grand ſerjeanty; but, though deſcended of a noble family, he was not permitted to perform it in perſon, until he had been dubbed a knight. At the ſame coronation, John Wiltſhire, citizen of London, claimed to hold a towel while the king waſhed before dinner, which claim being allowed, as he was of too low rank to perform the ſervice in perſon, he made Edmund Earl of Cambridge his deputy. Women likewiſe and minors were obliged to ſerve by deputy; as did, at that time, Anne Counteſs-dowager of Pembroke, by Sir John Blount, and her ſon John Earl of Pembroke, a minor, by Edmund Earl of March †.

Theſe grand ſerjeanties, which were moſt of them lands granted for the doing certain duties at the ſolemnity of the coronation, contributing to the ſplendour and dignity of the crown, have been ſtill retained, though all other military tenures have been changed into free and common ſocage. However, all theſe grand ſerjeanties were not for the bare purpoſe of attending at coronations. The lord high ſtewardſhip or ſeneſchalſhip of England, of which the duty is to preſide at the trials of peers, was annexed to the barony of Hinckly, which, paſſing into the family of Leiceſter, and then into that of Lancaſter, in the perſon of Henry the Fourth was united to the crown; but ever ſince that time, as the powers and privileges the law threw into his hands were looked upon as too extenſive, and dangerous, if continued, this officer hath only been occaſionally created, as for a coronation, or the trial of a peer, which ended, he breaks his ſtaff, and the office is va-

† Coke on Littleton, lib. 2. c hap. 8. Madox, Antiq. Exchеq. vol. 1. p. 321, 326.

vacant †. The ſame is the caſe, and for the ſame reaſon, of the office of high conſtable, ever ſince the attainder, in Henry the Eighth's time, of Edward Duke of Buckingham, who enjoyed it as Earl of Hereford. Thus did the crown get rid of two conſiderable checks, which concurring with other more extenſive and influencing cauſes, helped to raiſe the power of the houſe of Tudor above what the princes of the line of Plantagenet had enjoyed ‡. The office of earl marſhal, indeed, ſtill continues in the noble family of Norfolk. For, notwithſtanding the attainders of that family, when they were reſtored, it alſo was reſtored to them. The reaſon is, becauſe this office is of little power; indeed, in the vacancy of the conſtable to whom he is properly an aſſiſtant, ſcarce of any at all. It being, therefore, an honourable dignity, and attended with no danger, it is no wonder it hath remained ‖. In this kingdom one grand ſerjeanty remained till the year 1715, in the family of Ormond, that of butlerage; but it differed from thoſe before-mentioned in this, that it was not a ſervice ariſing from a grant of lands, but of the priſage of wines, an antient profit of the crown, due by prerogative, namely, a right to take two tons of wine, one before the maſt, and the other behind, out of every ſhip containing twenty tons or more, until Charles the Second purchaſed it from the Duke of Ormond by a perpetual penſion of four thouſand pounds a year §.

Eighthly, Petty ſerjeanty was another ſpecies of improper benefices, and, in our law, was compriſed under the

† Madox, hiſt. of Exchеq. vol. 1. p. 51.

‡ Ib. p. 40. 41.

‖ Ib. p. 43.

§ It may not be improperly remarked in this place, that about the 18th year of Henry II. Geoffrey Martel held in England the office or ſerjeanty of Pincernaria, or Butlerſhip. See Madox, hiſt. Exchеq. vol. 1. p. 50.

general head of *ſocage*, becauſe the ſervice was certain. It is, as Littleton ‡ defines it, where a man holds his land of our ſovereign lord the king, to yield to him yearly a bow or a ſword, or a dagger, or a knife, or a lance, or a pair of gloves of mail, or a pair of gilt ſpurs, or an arrow, or divers arrows; or to yield ſuch other ſmall things belonging to war; ſo this, as well as grand ſerjeanty, was a tenure of the king's perſon, and could not be held of a ſubject. Such is the grant the Lord Baltimore hath in his province of Maryland; for he yields every Chriſtmas five Indian arrows, beſides a fifth of all gold and ſilver found within this province.

Ninthly, All grants to women were of the nature of improper ones, becauſe they muſt always ſerve by deputy; and perſonal ſervice is eſſential to the proper military tenures †. But theſe were not introduced ſo early.

The tenth kind, and the laſt that I ſhall mention, of improper benefices, are thoſe that are of *things not corporeal*, and of which, conſequently, there cannot be a poſſeſſion manually delivered over, that is, they do not admit of livery and ſeizin, and therefore can be only conveyed by the improper inveſtiture, that is, by words or writing, accompanied by a ſymbol. Such are rights in, or profits iſſuing out of land, where another hath the poſſeſſion of it. As the feudal law diſtinguiſhes between corporeal things, whoſe poſſeſſion can be actually transferred, and incorporeal, which cannot; ſo doth our law make what is the ſame diſtinction between things that lie in livery, and things that lie in grant. In the firſt, it regularly requires an actual livery and ſeizin, and here a deed is not abſo-

‡ Lib. 2. cap. 9.

† Feud. lib. 1. tit. 8.

abſolutely neceſſary; but the ſecond paſs by the delivery of the deed. Here therefore a deed is abſolutely neceſſary; for although the feudal law admits the uſe of other ſymbols in this caſe, ours, for the greater certainty, preciſely requires this peculiar one, that there may be full evidence of what was conveyed. Of this laſt tenth kind as there are many and various ſpecies, I ſhall run over ſome of them in a curſory manner, to explain and ſhew their general nature.

The firſt I ſhall take notice of is, that which, I preſume, was the moſt antient, as it ſeems to have come in the place of thoſe repaſts the king gave to his comites, or companions, and is what is called *feudum de cavena*. *Cavena* ſignified the repoſitory, or repoſitories of the neceſſaries of life, while in thoſe ancient times the ſervices due from the demeſnes, or the ſocage lands, to the king or lords, were paid in kind. Things therefore neceſſary, or uſeful for the ſupport of life, diſtributed in ſpecie, out of the king's or lord's cellar or pantry, or both, were what the *feudum cavena* conſiſted in; and that this came in place of the antient conſtant entertainments, and feaſts, of the comites, or companions, appears from this, that it was a rule, even after other grants were allowed to be hereditary, that theſe determined with the life of the grantor, or grantee, which ever firſt happened to expire. Theſe grants likewiſe were of two kinds; ſome granted in conſideration of future ſervices; upon the failure of which a forfeiture was incurred, others, in reward for paſt ſervices, where nothing was expected for the future but general fealty. This difference runs through many other of theſe gifts that lie in grant. For the feudal law diſtinguiſhes them into *officioſa*, that is, to which a poſitive duty is annexed, and *inofficioſa*, where

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no ſubſequent ſervice is required, but general fidelity, which is incident to every tenure †.

The ſecond I ſhall mention is *feudum de camera*, which, I apprehend, was originally a ſubſtitution for what I have juſt mentioned, the *feudum de cavena*; for it was inſtead of an allowance of neceſſaries out of the cellar or pantry of the king, an annual allocation of a ſum of money for will, life, or years, according as it was granted out of the *camera*, or chamber where the king or lord kept his money; and this was, as the other I before mentioned into whoſe room it came, either a reward for paſt ſervices, in which caſe no future duty was required, or on conſideration of future ones. The penſions granted by the king in our kingdom (Ireland) out of his revenue, are of the nature of the former; and the ſalaries to judges and other officers are of the nature of the latter. What was common to both of theſe, the *feudum de camera & de cavena*, was, that, by the feudal law, they were not due at the ſtated time, unleſs there were proviſions in the *cavena*, or money in the *camera*, and that free from debts; for the lord's ſafety and dignity was to be firſt conſidered; but they were to wait for their arrear, till proviſions or money came in.

Another thing is to be obſerved, that, although, at the introduction of theſe tenures, all others were for the life of the grantor and grantee at moſt, yet when the others became perpetual, theſe continued long after to be only for the joint lives of the grantor and grantee, namely, as long as kings and great lords were conſidered as tenants for life, and incapable of alienating their demeſnes, or laying

† Bruſſel, uſage des Fiefs, tom. 1. p. 41. Du Cange, voc. Cavena and Canava.

ing any permanent charge upon them. But when, by the frequency of the example of alienations, and by the occaſional indigence of the kings and other lords, and the deſire deſigning perſons had to take advantage of it, alienations of the demeſnes were once introduced, to the prejudice of the ſucceſſor, theſe grants, as was very natural, as they were leſs hurtful than an abſolute alienation, were continued for the life of the grantee, though the grantor had died before †.

† Spelman, and Du Cange, voc. Camera, et voc. Feudum. Craig, de Feud. lib. 1. Diegeſ. 10.

LECTURE VIII.

Feudum Soldatæ—Feudum habitationis—Feudum Guardiæ—Feudum Gaſtaldiæ—Feudum mercedis—Incorporeal benefices in England—Advowſons—Preſentative advowſons—Collative advowſons—Donatives.

IN the preceding lecture I began to treat of the ſeveral kinds of improper benefices, which are transferable only by the improper inveſtiture, or, as the Engliſh law ſays, *lie in grant*; intending only to illuſtrate their general nature, without deſcending minutely into particulars; and of theſe I have already mentioned the *feudum de camera*, and that *de cavena*. I call theſe fiefs, even at the time I am now treating of, in conformity with the practice of the feudal writers: not with ſtrict propriety, indeed; for *feudum*, properly ſpeaking, ſignifies a tenure of inheritance, and ſuch were not yet introduced. But before I quit them, it will be proper to take notice of ſome ſub-diviſions of them, to be met with in the feudal writers.

I have already obſerved they were either gratuitous or officious, that is, without future ſervice, or with it. Of the firſt kind there were two ſpecies, that called *feudum ſoldatæ*, from the word *ſolidus*, which ſignified a piece of money, and was a gratuitous penſion, granted either out of the charity or bounty of the lord, or in reward of paſt ſervices; the other called *feudum habitationis*; which is liberty of dwelling in an houſe belonging to the lord, in whom the property ſtill doth, and the poſſeſſion is ſtill ſup-

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poſed to remain *. Of the officious ones Corvinus mentions three kinds, *feudum guardiæ*, *feudum gaſtaldiæ*, and *feudum mercedis*.

The *feudum guardiæ* hath annexed to it the defence of a caſtle, for the ſecurity of the realm; and this differs from the caſtle guard I have before mentioned, in as much as that, where lands were given for the defence of the caſtle, it was a corporeal benefice, and transferred by livery and ſeizin; namely, by admitting the conſtable into the caſtle, and delivering him the key thereof, and was an improper one only in reſpect of its duration, as in the early times, it continued only a year; but this I am now ſpeaking of was a penſion, paid out of the king's exchequer for the ſame purpoſe; and was of the ſame nature with the modern ſalaries of governors of garriſons †.

The *feudum gaſtaldiæ* was a penſion granted to a perſon for tranſacting the lord's buſineſs, as for being his treaſurer, ſteward, agent, or receiver. The *feudum mercedis* was in conſideration of being an advocate or defender of the lord. Such are grants to lawyers *pro conſilio impendendo*; and the ſalaries of the king's lawyers, and the ſolicitors for the crown ‡.

I ſhall next run over briefly the ſeveral kinds of incorporeal benefices which the law of England takes notice of, and explain their general nature. And the firſt I ſhall take notice

* Du Cange, voc. Soldata, et voc. Feudum ædificii.

† Coke on Littleton, lib. 2. chap. 4.

‡ Du Cange, voc. Gaſtaldus.

notice of is an *advowſon*, which is a right a man hath of nominating a proper perſon to fulfil the duties, and to receive the profits of an eccleſiaſtical benefice. Theſe rights aroſe thus. In the infancy of the chriſtian church, when the clergy were ſupported by the voluntary contributions of the people, the biſhop was choſen by the clergy and people at large; and this method was ſo firmly eſtabliſhed, that when the emperors became chriſtians, although they made great donations of lands to the church, yet they left the manner of election as they found it; and ſo it continued in Rome until the year 1000 at leaſt. But theſe elections, made by the giddy multitude, were the occaſions of infinite diſorders. The value of theſe offices being encreaſed, and the manners of the eccleſiaſtics corrupted by the acceſſion of riches; parties and factions were eternally forming, and ſupported by all methods; and when a vacancy happened, the conteſt was frequently not decided without bloodſhed. It is no wonder that all the ſober part of the clergy, who were ſcandalized at theſe irreligious practices, and the emperors, who were concerned in the peace of their dominions, concurred in remedying theſe evils; which was at length effected by excluding the laity, gradually, and by inſenſible degrees, and confining the election to the eccleſiaſtics. Many of the emperors, indeed, ſtruggled hard to get the nomination to themſelves, but the clergy proving too powerful for them, they obtained, at moſt, but a power of recommendation †.

In the northern kingdoms the ſame cauſes produced the ſame effects, as to the excluſion of the laity, but with more advantageous circumſtances to the rights of theſe princes. For as the lands they gave to the biſhops in right of their churches were held of them, ſo they gave the inveſtiture; and

† Gibſon, Cod. Jur. Eccleſ. Anglican. tit. 23.

and there was a kind of concurring right between the clergy who elected, and the king. He inſiſted on his right of giving the inveſtiture, but generally received their nominee, and granted it to him.

But after the time of Charles Martel, when the clergy were ſtripped of moſt of their lands, things took a different turn. For when new grants were made to the church by the king, he inſiſted, as feudal lord, on the abſolute nomination, and the giving inveſtiture, by delivering the ſtaff or croſier, the emblem of his paſtoral care, and the ring, the ſymbol of his ſpiritual marriage with the church; but theſe rights were oppoſed by the clergy, who were ſtrongly ſupported by the popes then ſetting up for being the feudal lords of all churchmen, and who hoped to derive, as they did, great advantage from theſe diſſentions. From the year 1000 to 1200, great confuſion ſubſiſted throughout all Europe, occaſioned by theſe conteſts, until the popes in general prevailed; but for four hundred years paſt, and particularly ſince the reformation, their power hath been on the decline; and from this laſt period the patronage or advowſon of biſhoprics hath been confeſſedly in our king, as hath been the caſe in ſeveral other kingdoms; and though in England a form of election is ſtill retained, it is no more than a mere form *.

The advowſon, or patronage of inferior benefices, came in another way. In order to underſtand this, let us conſider how dioceſes came to be ſubdivided into pariſhes.—

Antiently,

* Monteſquieu, l'Eſprit des Loix, liv. 31. chap. 11. Bacon, hiſt. and polit. diſc. on the laws and government of England, ch. 59. Inett's hiſt. of the Engliſh Church, vol. 2. ch. 2.

Antiently, I mean about the year 420, the biſhop had the ſole cure of ſouls throughout his whole diſtrict, and received all the profits of it; which he and the clergy diſtributed into four parts, not exactly equal ones; but unequal, according to the exigences of the ſeveral intereſts to be conſidered; one to the biſhop, to maintain hoſpitality, and ſupport the clergy reſiding with him, and the Chriſtians of other places, who were often forced to fly from perſecution, or travelled on their neceſſary concerns; one for the building and repair of churches; one for the poor, and one to ſupport the inferior clergy, whom the biſhop uſed to ſend to particular places, as his deputies, and to remove or recal at his pleaſure. The clergy who lived in the city where the biſhop reſided, were ſupported by him in a collegiate way at firſt; until at length their particular ſhares were aſcertained, and carved out of the general revenue of the church; and this was the origin of *chapters* *.

To return to the country clergy. The manner in which they came to have ſettled eſtabliſhments was thus: It was uſual, as ſoon indeed as tithes were eſtabliſhed as a law, that is, before or about the time of Charlemagne, for the biſhop to allocate to his vicar or curate in any diſtrict, the whole, or a part of the tithes or profits ariſing there; but when England, France, and other countries were ravaged by the Danes and Normans, the fury of theſe barbarous heathens fell particularly on the eccleſiaſtics. Their churches they burned, and themſelves they ſlaughtered without mercy; inſomuch that, when their devaſtations ceaſed, there enſued not only a great ſcarcity of clergymen, but ſuch a want of means of proper ſupport for them (the old

* Gibſon, Cod. Jur. Eccleſ. Anglican, tit. 23.

old eſtates of the church having been turned into military fiefs) that the feudal lords were willing, for the ſake of having divine ſervice performed in their diſtricts, for the benefit of themſelves and their vaſſals, to alienate part of their lands to the church, which was then in indigence, for the purpoſe of building houſes for the parſon, and providing a competent glebe for him, and alſo for building new churches where they were wanted. Altho' alienation was at this time entirely diſallowed by the feudal cuſtoms, yet the neceſſity of thoſe times prevailed againſt it in thoſe inſtances, eſpecially as theſe ſuperſtitious people attacked, or ready to be attacked by an heathen enemy, thought the lands ſo given to be really given for military ſervice, as they were given for the ſervice of God, the Lord of Hoſts, who was to ſpeed their arms. However, the circumſtances and opinions of that age would not allow any grant, without an acknowledgment of the ſuperiority of the grantor; nor allow any lord to give any grant materially detrimental to his military fief. Hence, as an acknowledgment that the lands ſo granted to the church proceeded from the bounty of the Lord, he was allowed to nominate a clergyman to the biſhop; who, if he was qualified, was obliged to admit him. But as the patron might preſent an improper perſon, and ſuch an one as the biſhop muſt be obliged in conſcience to reject; and might do this repeatedly, for any conſiderable length of time, during which the duties of religion would be neglected, it was, in after times, ſettled, in all countries, that the right of the patron's preſentation ſhould laſt only a limited time. In our countries it is ſix months; after which time lapſed from the vacancy, the biſhop's original right of nomination revives *.

But

* Ibid.

But the cuſtoms of thoſe ages not admitting of the alienation of any part of a military tenure, but what was abſolutely neceſſary, it followed that theſe glebes were far from being ſufficient for the maintenance of a parſon.—Theſe grants, therefore, were not made without the conſent of the biſhop, to allocate, in aid of the glebe, the tithes of that precinct, to the uſe of the parſon. And now the parſon began to have a permanent intereſt for life in his pariſh, and a permanent cure of ſouls therein; but not excluſive of the cure of ſouls in the biſhop, who was concomitant with him in that point, though not in the profits. For when the biſhop, for the good of the church, appropriated a part of the revenues of the church to a particular perſon and his ſucceſſors, which, for the public good, he was allowed to do, he could not, however, diveſt himſelf, or his ſucceſſor, of that general cure of ſouls through his whole diſtrict, which was the eſſence of his office. As the parſon, therefore, though named by a layman, was his deputy, he was in truth (to ſpeak by way of accommodation) his feudal tenant. From him he received inſtitution, which is the improper inveſtiture; to him he gave the oath of canonical obedience, which is equivalent to the oath of fealty; and by him, or perſons appointed by him, he was inducted into his church, that is, had livery and ſeizin given him *.

This was the origin and nature of preſentative advowſons, in which, though a matter eccleſiaſtical, the lay patron was allowed to have a temporal and a valuable intereſt: inaſmuch as it might ſerve for a proviſion of one of his children, or any other relation that was qualified for it; and conſequently be an eaſe to him; and as, at the time

* Ibid. and tit. 30.

time that theſe glebes were granted moſt fiefs were hereditary, at leaſt none were ſuffered to be granted but by thoſe who had ſuch (becauſe the lord ſuperior might elſe be diſinherited) this right of *advowſon preſentative* deſcended to the heir. The church in its diſtreſs exceedingly encouraged and foſtered theſe rights for a time; but when her circumſtances changed, and, in ages when profound ignorance prevailed both among the clergy and laity, many were the attempts to deprive the laity of their rights, and many the exclamations againſt the impropriety and impiety of ſuch perſons pretending to name any one to an holy office. But I do not find they ever thought of reſtoring to the laity the glebes, in conſideration of which, for the neceſſities of the church, thoſe rights were firſt allowed.

Thus much for *preſentative advowſons*, which, I hope, from what hath been already obſerved, will be ſufficiently underſtood for the preſent. I now muſt proceed to *collative advowſons*, namely, thoſe given by the biſhop, which were of two kinds; either abſolutely in his own right, or by lapſe, when the patron neglected to preſent; which was in truth but a devolution of the ancient right he had parted with, to him; and therefore, as there is no ſubſtantial difference, they may well be treated of together. As the biſhop in the caſe of lapſe, collates, that is, inſtitutes in his former right in default of the perſon who had the right of preſentation, I obſerved before, that the biſhop had uſed to grant to the country clergy a part or the whole of the tithes of the precincts they ſerved in; but when once, by the allowance of preſentative advowſons, parſons had got freeholds in them, the example became contagious, and much to the benefit of the church. Thoſe parts of the dioceſe which ſtill remained in the biſhop's hands were divided into pariſhes; and the tithes of them, or at leaſt a conſiderable

conſiderable part of them, were aſſigned to the miniſter for his life. I need obſerve no farther of theſe, than to ſay, that they differed no otherways in their nature from the laſt mentioned, than that, as a patron had nothing here to do, there was no preſentation, and that, *collation* is, in the caſe where the biſhop hath the ſole right, what is called *inſtitution* in the caſe of a clerk preſented.

The third and laſt kind of advowſons are thoſe called *donatives*, in the giving ſeizin of which the biſhop hath nothing to do, ſuch livings being privileged, and exempt from the juriſdiction of the biſhop, and viſible by the patron only. How theſe exemptions aroſe, when, at firſt, every place was a part of a dioceſe, and of the biſhop's cure of ſouls, it will be worth while to inquire. The biſhops of Rome, aided by their great riches, and the fall of the weſtern empire, did, by purſuing a ſettled plan for many hundred years, with the greateſt art and unſhaken perſeverance (temporizing indeed when the ſeaſon was unfit, but never giving up expreſsly any point that had been claimed) at length, inſtead of being the firſt biſhops in rank, attained to a juriſdiction over all the weſt, and claimed a general cure of ſouls, which made the biſhops, indeed, but paſtors under them. However, conſcious of their uſurpations, in order to eſtabliſh them, it was neceſſary to depreſs the epiſcopal order.

They began firſt with diſmembering biſhoprics, in order to found new ones, on pretence of the churches being better ſerved; and this they did principally in Italy, where their influence was moſt extenſive; and that with a view, by having a greater number of votes, to over-rule the determination of the general councils. They did the ſame, but more ſparingly, for the reaſon aforeſaid, in other countries,

visitable

tries, with the ſovereigns; who, in theſe caſes, were really actuated by the motive of advancing the public good, and promoting religion. The next ſtep was more deciſive.—Their authority being now eſtabliſhed, they took occaſion, on ſeveral pretences, to exempt from the juriſdiction of the biſhops, ſeveral places within their dioceſes, which they kept immediately under themſelves, to which they appointed clerks by this way of donation, and whom they viſited by their legates, as their immediate ordinary. The clergy, thus provided for, ſerved as faithful ſervants and ſpies to the pope, in all parts of the chriſtian world, and were, next to the monaſteries, the firmeſt ſupport of his power. The ſame practice they purſued with reſpect to biſhoprics, by exempting ſeveral of them in divers places from the archbiſhop of the province. And this was the origin of donatives. But, in order to ſhew the plenitude of their power, the next ſtep they took was of a higher ſtrain. They not only founded donatives for themſelves, but for others, even of the laity; ſhewing by this, that all eccleſiaſtical juriſdiction and diſcipline was entirely ſubject to their will, and that, at pleaſure, they could transfer it to hands before judged incapable of it.

Theſe two kind of donatives ſtill ſubſiſt in England, the latter in the hands of ſubjects, the former of the king as ſupreme ordinary, ſince the pope's uſurped power was transferred to Henry the Eighth. I am ſenſible many common lawyers inſiſt that the king of England was always ſupreme ordinary, and that nothing new was gained at that time, but only his old authority, which the pope had uſurped, reſtored to him. But what ſhall we ſay to the firſt fruits and tenths; which are certainly papal impoſitions, and comparatively of a modern date. The ſame I apprehend to be the caſe of the ordinary juriſdiction. As the ſupreme patronage, I allow it was, originally, the king's. My reaſon is, that I do not find in the antient church any trace of a layman ſolely exerciſing

erciſing eccleſiaſtical juriſdiction, or enacting laws for the church †.

In the apoſtolic times all things were tranſacted by the *faithful* at large; in the next age, they fell into the hands of the clergy, all excepting the election of biſhops, and approbation of clergymen. After the emperors became chriſtians, they publiſhed indeed eccleſiaſtical laws, but that was only giving the ſanction of the imperial power to the canons the church had made; whoſe cenſures, when there were ſuch multitudes of new and counterfeit converts, were likely to have little weight. In the northern nations the caſe was the ſame. Canons were made by the clergy, and theſe were often enforced and turned into obligatory laws by their general aſſemblies, who had the legiſlative authority; and if there are any inſtances in thoſe times of laymen exerciſing eccleſiaſtical diſcipline as ordinaries, I own they have eſcaped me. I ſpeak merely of eccleſiaſtical diſcipline: for as to things of a temporal concern, ſuch as wills, adminiſtrations, marriages, tithes, &c. the authority undoubtedly was from the king. But not as to matters entirely ſpiritual, ſuch as concern the *ſalutem animæ* ‡.

I think therefore the king's title to be ſupreme ordinary, ſtands better ſettled on the parliamentary declaration, and on the reaſon of the thing, that all coercive power ſhould be derived from him, whom God hath made the ſuperintendant; than on the aſſertions of lawyers, that it always was ſo. Matters of fact are to be determined by evidence, not by conſidering what ought to have been; and we need not be ſurprized to find, that an ignorant and ſuperſtitious people allowed practices, and a diviſion of power in themſelves unreaſonable.

In

† Gibſon, Cod. Jur. Eccleſ. Anglican, tit. 34.

‡ Gibſon, tit. 1. and 2.

In theſe donatives there was neither inſtitution nor induction. The patron gave his clerk a title by deed, on which he entered; for the plenitude of the papal power ſupplied all forms. The patron was the viſitor, and had the power of deprivations; but what clearly ſhews, in my apprehenſion, that theſe donatives were incroachments on the epiſcopal authority, is, that, if once a common patron (for the king was ſaved by his prerogative) had preſented his clerk, and he got inſtitution and induction, the donative was gone for ever. The living became preſentative, and the biſhop's juriſdiction revived.

I ſhould next proceed to tithes, another kind of incorporeal benefice; but this would carry me too great a length for the preſent diſcourſe.

LECTURE IX.

Tithes—The voluntary contributions of the faithful, the original revenue of the church—The eſtabliſhment of regular payments—The appropriations of the church—The hiſtory and general rules of tithes in England.

THE next kind of incorporeal beneficees taken notice of by the law of England, that I ſhall mention is *tithes*; the New Teſtament, as well as common reaſon, ſays, that *they who ſerve by the altar, ſhould live by the altar*; but is ſilent as to the manner in which this ſupport ſhould ariſe. In the very firſt times, when their numbers were but few, and thoſe confined to Jeruſalem and its neighbourhood; the chriſtians ſold all they had, and lived out of the common ſtock. But this laſted a very ſhort time.—When they increaſed to multitudes, that method was found impracticable, ſo that each retained his poſſeſſions, and gave a voluntary contribution out of it at his diſcretion. This was the fund of the church; and in thoſe times of fervent zeal in the laity, and ſimplicity of manners in the clergy, it was found abundantly ſufficient, not only to ſupport the miniſters, and their own power, but alſo to build churches, and to do many acts of charity to ſome of the pagans.

The revenues of the church went on continually encreaſing to the time of Conſtantine; and though by the Roman laws, no *colleges*, as they called them, that is, communities,

communities or fraternities, unleſs they had the ſanction of the imperial authority, could accept legacies or donations, yet, ſuch was the devotion of the times, that many ſuch private grants were made; and the principal churches obtained great acquiſitions, not only in moveable goods, but in landed eſtates; inſomuch that ſome of the perſecuting emperors were thought to be as much inſtigated to their cruelties by avarice, as by their blind attachment to their pagan ſuperſtition *.

In the fourth century, the reſtraint being taken away, theſe largeſſes from the rich and ſuperſtitious to the church became much greater; but the general voluntary contributions from all who could ſpare, diminiſhed, the apparent neceſſity for them being leſſened; and the zeal of the people, which perſecution had kept warm and fervent, ſlackened from eaſe and ſecurity. The biſhops, who were the diſtributers, prided in vying with each other in the magnificence of their churches; and, being now raiſed to an eminent rank in the ſtate, were not ſatisfied to live in ſuch a manner as contented the ſimplicity of the antient fathers of the church; ſo that by the year 400, the inferior clergy and the poor were, in many places, but in very ſcanty circumſtances. This induced many of the pious to fix upon a certain rate out of their own annual gains to ſupply theſe neceſſities, and as the tenth was what had been aſſigned to the Levites in the moſaical law, that generally became the proportion. But as the payments of thoſe tithes were purely voluntary, ſo did the givers appropriate

* Father Paul on beneficiary matters, ch. 2. and ch. 6. Selden's hiſtory of tithes, ch. 4. ſect. 1. Spelm. larger work of tithes, ch. 6.

propriate them in ſuch manner as they pleaſed, and as they thought they were moſt wanted †.

In Egypt, where, it ſeems, this practice began, they were commonly given to the monks, who had devoted themſelves to a religious poverty; in all Illyricum generally to the poor; in other places to the inferior clergy of ſuch a diſtrict, or, if the church itſelf was indigent, to the biſhop, for the uſe of his church. The famous preachers about this time, particularly St. Ambroſe and St. Auguſtine, inforced this practice with all their eloquence, and inſiſted on the levitical law of tithes as binding on chriſtians. This had great, but not general effects. Some gave the tithe, others, of more zeal, gave more, and others leſs; and though theſe contributions began now to be aided by the ſpiritual arms of excommunication, yet were theſe only uſed to oblige a man, in teſtimony of his being a chriſtian, to make ſome offering, not to pay preciſely the tenth, or any other portion ‡.

Theſe payments of the tenth hitherto we ſee were voluntary; but there ſoon came in another practice, which, in particular places, made them compulſory. It was uſual when a patron founded a church, in order for its ſupport, to charge his lands with the payment of tithes to the miniſter who officiated therein. This created a permanent right in the church, not by the force of any general law, or canon (for all ſuch attributed to theſe ages are forgeries of a later date) but from the eſpecial gift of the grantor, and the power he had to charge his land. The earlieſt authority

† Selden's hiſt. of tithes, ch. 6. and 7. Spelm. larger work of tithes, ch. 29.

‡ De non temerand. Eccleſ. tract. Spelm. p. 3.

thority that proves a general right of tithes, through any country of Europe, is to be met with in the council of Maſcon, held under king Guntram, who reigned in the ſouth-eaſt parts of France, in the year 486. There the right of tithes, through all his dominions, is acknowledged as an ancient duty due to the church; and they are enjoined to be regularly paid. But it is obſervable, in the very words of this law, that the tithes ſo paid were not ſolely appropriated to the clergy, but much of them applied to other charitable uſes, *unde ſtatuimus, ut decimas eccleſiaſticas omnis populus inferat, quibus ſacerdotes, aut in pauperum uſum, aut in captivorum redemptionem erogatis, ſuis orationibus pacem populo & ſalutem impetrant.* Thus the kingdom of Burgundy was the firſt that eſtabliſhed the univerſal payment of tithes by a poſitive law. This payment, in the other parts of France, was long after at pleaſure, or by particular foundation; but was daily gaining ground, eſpecially after the impoveriſhment of the church by Charles Martel rendered them more neceſſary; and his grandſon Charlemagne was the firſt that eſtabliſhed them by a poſitive law, made in a general aſſembly of the ſtates, through all France; and that as due by a divine right, in the year 778. And as he and his ſucceſſors were maſters alſo of Germany and Italy, the ſame law and opinion ſoon paſſed into thoſe countries †.

But as poſitive as his law was, in the direction of payment of them to the biſhop or prieſt, it was for a long time not univerſally obeyed, and where it was obeyed, often ſhamefully eluded, as appears by the laws of his ſucceſſors, and many eccleſiaſtical canons framed for the redreſſing thoſe miſchiefs. For as a portion of the tithes was originally

† Monteſquieu, l'Eſprit des loix. liv. 31. chap. 12. Selden of tithes, ch 7 Father Paul of benefices, ch. 11.

nally diſtributed to the poor, under this pretence, it was cuſtomary for the ſuperſtitious laity, when they granted the tithes, inſtead of aſſigning them for the maintenance of the miniſtering, *i. e.* the ſecular clergy, to appropriate them to monaſteries, which were ſocieties of voluntary poor. Theſe appropriations, or conſecrations, as they were called, became very numerous, both from the unbounded veneration paid to the monks, and from the encouragement ſuch grants received from the ſee of Rome, which looked upon the monaſtic orders as its faſteſt friends, and was bent upon raiſing them on the ruin of the ſecular clergy. But as the monks of thoſe times were generally laymen, and incapable of ſerving the cure, it grew into a practice for them, if any of their own body was fit for the purpoſe, to get him ordained; or if they had none, to employ a ſecular prieſt, to perform the divine offices, under the name of their vicar or deputy, who was to account with them for the profits, and was to receive for his ſubſiſtence a ſtipulated proportion; and thus came in the diviſion of parochial tithes, into *rectorial* and *vicarial*; the former remaining in the *employer*, the latter in the *employed*, who did the duty †.

The ſame pretence of appropriating the tithes to the poor gave a handle likewiſe to many, when they found it neceſſary to pay tithes, to grant them to laymen in fee, under the like conditions and ſervices as other fiefs; and many likewiſe were the unworthy churchmen, who turned the incomes of their church into proviſions for their families, by granting them in fief. Thus, in proceſs of time, were the miniſtering clergy, and the real poor, for whoſe ſupport the tithes were originally granted, in a great meaſure

† Father Paul of benefices, ch. 14.

ſure ſtripped of them; and they were converted either into lay inheritances, for ſecular ſervices, or applied to the ſupport of monaſteries; and both theſe abuſes began under the ſpecious pretence of charity. The latter, *viz.* the grants to monks, was always favoured by the heads of the church; and the former, in ſpite of all their cenſures, prevailed, until, at length, it was found neceſſary to apply ſome remedy to both. The evils were too inveterate to be finally removed; but this temper was found out in the council of Lateran, held in 1215, when it was enacted, That all tithes which from time immemorial had been given in fief might ſo continue, but no more be granted in that manner for the future; and the approbations to monaſteries were confined to three orders of monks who were looked upon as the moſt learned, and capable of furniſhing men fit for the duty†.

I ſhall proceed now to ſay ſomething of the fate of tithes in England. That tithes had been paid in ſeveral parts of England during the heptarchy, and eſtabliſhed by law in ſome of its kingdoms, is undeniable; but the firſt who ordained them by law, through all England, was Ethelwolf, in his parliament of the year 855; who had been himſelf, in his elder brother's life, deſigned for the church; in this imitating Charlemagne, at whoſe court his father had long reſided. This may well be allowed, although thoſe authors that give us the copy of this law differ in the date, both as to the time and place where it was made. But be that as it may, his ſon Alfred certainly made a law for this purpoſe, to bind not only his own Engliſh, but alſo the new converted Danes, to whom he aſſigned ſeats in his kingdom and whom he had ſubmitted to the government of Guthrun.

Such

† Giannone's hiſt. of Naples, b. 19. chap. 4. § 2.

Such laws were renewed by almoſt every one of his ſucceſſors down to the Norman conqueſt; an evident proof, that however zealous thoſe princes were for the ſupport of the church, their pious intentions were but ill ſeconded by their people. The ſeverity of the law of Edgar was remarkable, and of itſelf ſufficient cauſe of their backwardneſs; for it made the non-payment of the tenth a forfeiture of eight-tenths. The *præpoſitus* of the king and biſhop, that is, I preſume, the ſheriff and arch-deacon, were to ſeize the fruits out of which the tithes had been with-held, and when they were divided into ten parts, one was given to the church that had been defrauded, another to the proprietor, and the remaining eight were divided between the king and the biſhop *.

During theſe times appropriations of tithes, to other churches than the pariſh one, and alſo to monaſteries, were frequent, here as well as on the continent; but, for ſome time after the conqueſt, the largeſſes to the monks, with reſpect both to lands and tithes, encreaſed conſiderably, and were continually encouraged by the popes, the kings, the biſhops, and nobility; by the popes for the reaſon already given; by the biſhops and nobility, who were all Normans or foreigners, out of partiality to their countrymen (for ſuch the monks generally were) and out of contempt and hatred to the ſecular clergy, who were univerſally Engliſh; by the kings, not only for this laſt mentioned cauſe, but for another peculiar to themſelves. The government of the Saxon kings was remarkably moderate, and their laws and conſtitutions extremely favourable to the liberties of the people. The firſt race of Norman kings pretended, indeed, a right to

* Selden on tithes, chap. 8. Bacon, hiſt. and polit. diſc. on the Laws and Government of England, chap. 59. L. l. Angl. Sax. ap. Wilkins.

to the throne, and every one of them ſwore to obſerve the Saxon laws, with ſuch emendations as had been conſented to in parliament by William the Firſt. But the conduct of every one of them ſhewed how little regard they had to that obligation, and how bent they were on ſetting themſelves free from all reſtraint, and to deſtroy all traces of the old Saxon laws. For this purpoſe it was abſolutely neceſſary to depreſs the ſecular clergy; who, in thoſe times of ignorance, were the only lawyers; inſomuch, that, in William the Second's reign, it was ſaid *nullus clericus, niſi cauſidicus;* and, to render them unfit guardians of thoſe privileges, the kings were reſolved to trample upon them. For this end, a new language and new forms of proceeding were introduced into the courts, the ſecular and eccleſiaſtical juriſdictions, which had been united, were ſeparated; and the clergy were baniſhed from the temporal courts, and the greateſt part of the buſineſs which formerly had been tranſacted in the country courts was transferred to the *curia regis*, under the immediate inſpection of his judges *.

Thus were the ſecular clergy daily reduced in circumſtances and importance, while the monaſteries flouriſhed on their downfall. However, about the time of Henry the Third (for it is hard preciſely to fix when it became an allowed maxim of the Engliſh law) all tithes ariſing in any pariſh were, of common right, payable to the prieſt of that pariſh, unleſs they had been previouſly appropriated to ſome other prieſt, or monaſtery, either by a poſitive appropriation appearing, or by preſcription where that was loſt, and

† Brady, Appendix to his hiſt. p. 15. Carte, hiſt. of England, vol. 1. p. 441.

and that no layman could preſcribe againſt the payment of them. I ſay no layman, for with reſpect to eccleſiaſtics, thecaſe was otherwiſe. It had, indeed, been a controverſy in France ſeveral centuries before, whether the lands of a church or monaſtery ſhould pay tithes to the pariſh miniſter where they lay; but it was determined by the better opinion that they ſhould. However the biſhops of Rome, in complaiſance to their friends the Monks, granted to many monaſteries an exemption from tithes for their lands. And theſe are the lands, which we ſee at this day in the hands of laymen diſcharged of tithes, by virtue of a ſtatute in the reign of Henry the eighth; before I proceed to which, it will be proper to take notice of what a *modus* is, as they were introduced in thoſe early times.

A modus, then, is a compoſition for tithes in kind, within a certain diſtrict; whereby the layman is diſcharged from rendering his tithes, on his paying to the parſon, in lieu thereof, what the local cuſtom of that place directs. Theſe compoſitions were originally for the mutual benefit of the clergy and laity; that one might have a ſettled certainty what to receive, and the other what to pay; and was, while the equivalent continued to bear any reaſonable proportion to the value, an excellent means to prevent yearly diſputes between the miniſter and his flock; but as moſt of them are fixed at certain rates of money, the change of its value hath, in all theſe caſes, greatly impoveriſhed the parochial clergy, eſpecially as many of them grew up into a preſcription, by the negligence of the clergy, without an original compoſition. Theſe *moduſes* have, likewiſe, not a little hurt the ſpiritual juriſdiction; for as their courts paid little or no regard to them, as being againſt the canon law, if the original compoſition did not appear to have the biſhop's authority, by being found in his regiſtry, the temporal courts, wherever one is pleaded, ſend a prohibition to the eccleſiaſtical one, and reſerve the tryal to themſelves,

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by a jury of twelve men, as the legal judges of the cuſtoms †.

When Henry the eighth threw off the pope's ſupremacy, great was his danger both from abroad, and at home, particularly from the monaſteries. A reſolution therefore was taken for ſuppreſſing them, and applying their revenues to more uſeful purpoſes. The intention of Cranmer, at leaſt, was to reſtore the tithes to the parochial clergy, and out of ſome part of the lands to found new biſhopricks, and for other religious and charitable purpoſes; the remainder to be united to the royal demeſnes to enable him to defend his realm without burthening his ſubjects with ſubſidies. But little of this kind was done. Five or ſix biſhopricks, with very poor revenues, were erected, and the reſt, both of lands and tithes, were diſtributed to the laity in whoſe hands they ſtill remain, partly out of preſent political views, but principally from the extravagance of that king and the indigence of his ſucceſſors, concurring with the avarice of their courtiers. As to the lands the abbots held diſcharged of tithes, the pariſh miniſters right to them would, by the common law of England, have revived as ſoon as they got into layhands; as it would have done before, if the abbot had aliened with the conſent of the convent, and this was the caſe of the lands of the leſſer monaſteries. But when the greater ones were diſſolved by the act of 31ſt of Henry the eighth, it was expreſsly provided, that the king and his grantees ſhould enjoy thoſe lands, diſcharged from tithes, in as ample a manner, as the abbots held them before that time. Thus became a great part of the tithes of the kingdom, which by the common law of England were the legal maintenance of the parochial

† Selden on tithes, chap. 14.

parochial clergy, lay fees, and inheritances, as they continue at this day †.

Tithes are of three kinds, *prædial*, *perſonal* or *mixed*.—Prædial, are the fruits ariſing immediately from the ground, as all ſorts of grain, hay, underwoods, fruits of trees, hops, ſaffron, hemp, flax, and ſuch like. Mixed, which ariſe from cattle nouriſhed by the ground as their young, colts, calves, lambs, pigs, or their productions; as milk, cheeſe, butter, &c. Thirdly, perſonal, which ariſe from the labour and induſtry of men uſing any merchandize, or manual occupation, and is the tenth part of their clear gain.

The two firſt had their foundation in the law of Moſes, the laſt was introduced and ſtrongly inforced by the canon law, nay ſo ſhameleſs were ſome of the canoniſts, as to inſiſt that harlots were obliged to pay the tenth of their infamous gains; but this latter kind has had little effect in England, except by the local cuſtoms of ſome particular places ‡.

As to what things are tithable or not by our law, it may not be amiſs to lay down ſome general maxims concerning them.

Firſt then, as to prædial tithes: Regularly, they are due only out of things that encreaſe annually, *ſimul & ſemel*, and therefore, except by ſpecial cuſtom, mines, minerals, chalks, ſtones, ſlates, turfs, being part of the ſoil, and not increaſing annually, are not tithable; but this rule admits

† Carte's hiſt. of England, vol. 3. p. 136, 143, 148, 149. Lord Herbert's life and reign of Henry VIII. p. 186. et ſeq. ap. Kennet.

‡ Gibſon, Cod. Jur. Eccleſ. Anglican. tit. 35. Hume, vol. 1. p. 51.

admits of ſome exceptions, of which I ſhall juſt mention two. Saffron, which encreaſes from three years, to three years, is yet tithable; and ſo is underwood, that is, all trees cut under twenty years growth. The tithes of trees occaſioned many conteſts between the clergy and laity in England, the one exacting it by their canons, and the commons in parliament conſtantly remonſtrating againſt it.—At length it was ſettled by parliament, that none ſhould be exempted but timber above twenty years growth, as being fit for building. But this ſtatute is ſo conſtructed, that if the trees be not of the nature of timber, they are tithable, though above that age, as buſh, birch, and the like; but theſe, if for the ſcarcity of other timber, they are uſed in building, as beech is in Buckinghamſhire, they are there exempted.

As to mixed tithes, the rule is, that things *feræ naturæ* are not tithable. Therefore fiſh, pheaſants, partridges, rabbits, deer, bees, and ſuch like are not; but ſeveral of theſe, if reclaimed, have been adjudged to be ſo, as bees in a hive, and the ſame reaſon holds as to pigeons in a dove houſe; though the opinion of common lawyers is, that they are not tithable, if ſpent in the houſe, and not uſed for ſale.

But what ſhall we ſay for barren cattle, from whom no yearly profit ariſes? Shall the parſon receive no benefit whatever from them, and ſhall it lie in the power of the occupier, by employing all his land in feeding nothing but barren cattle, to leave his miniſter without ſupport? Certain it is, whatever the modern practice and opinion may be, that by the beſt authorities of the antient lawyers, *agiſtment* was due to the clergy which was the tenth part of the value of the lands, or the twentieth, which by cuſtom,

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in moſt places, was generally paid, if the proprietor depaſtured the whole year, or leſs, according to the time and quantity of the cattle, ſaddle horſes, or cattle for the plough, only excepted †.

Thus much may ſuffice for the hiſtory and general rules of tithes, the ſecond ſpecies of incorporeal rights, to which I may add, as much of the ſame nature, and founded on the ſame reaſon, what is called *miniſters money* out of houſes, in cities and towns, where there are no tithes, which the act of parliament, of the 17th and 18th of Charles the ſecond, hath reſtrained to the twentieth part of the value of houſes, as valued by a commiſſion from the Lord Lieutenant and ſix of the council.

† Wood, Inſtitute of the Laws of England, fol. 161. et ſeq.

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LECTURE X.

The right of Seignory and its conſequences—The right of Reverſion—Rent ſeck—Rent charge—The nature of diſtreſs, *as the remedy for recovering feudal duties. Obſervations on* diſtreſſes *in general.*

HAVING ſpoken of tithes and advowſons, two kinds of incorporeal benefices that aroſe in thoſe ancient times, I come now to treat of *ſeignories* and their conſequences. A ſeignory is an incorporeal right and intereſt ſtill remaining in the lord, when he parts with his lands, in benefice to a tenant. Now the rights of a lord, in reſpect of his ſeignory, may be conſidered in two ways, either as the ſervices were due to the lord from the *perſon* to the tenant, or from the *lands*. He hath therefore, in virtue of his ſeignory, a right to all thoſe perſonal duties which flow impliedly from the oath of fealty; ſuch as to receive warning from his tenants of any injury done, or impending danger to his perſon, his dignity, or ſeignory, to receive faithful advice from them when called upon, and to have his ſecrets faithfully kept by them; to be the judge of their controverſies, and the leader in war of ſuch of them as hold by military ſervice. For theſe barbarous people had no idea of dividing power, but always entruſted the civil and military ſword in the ſame hands; whereby they avoided the dangers and diſorders that more poliſhed and richer nations have ever been expoſed to, namely, of having the civil and legal authority ſubverted by the mili-

tary power. And ſo ſtrict was the bond between lord and tenant, that the latter could in no wiſe, in point of judgment, decline his lord's juriſdiction, by refuſing him as judge on account of partiality. Such a charge was a breach of fealty on the vaſſal's part, and no ſuch preſumption could be admitted by that law, which looked upon the lord as equally bound by the oath of fealty, though not taken by him, as the tenant was *.

By the Roman law, a ſuſpected judge might be refuſed by the ſuitors for almoſt all the ſame cauſes, and grounded moſtly upon the ſame reaſons, for which jurors, who in our law are *judges of the fact*, may be challenged at this day. But the feudal cuſtoms admitted no ſuch ſuſpicions as to the lord, and therefore in the Engliſh law, no judge, however clearly intereſted in the cauſe, can be challenged. This maxim once eſtabliſhed, it was neceſſary, however, for the ſake of juſtice, that it ſhould admit of ſome qualification. The *aſſeſſors* in Germany, who aſſiſted the lord in judgment, from whom came, in after time, the *pares curiæ*, were this qualification. But as theſe were not judges in all feudal cauſes, but in ſome the lord alone continued ſole judge; ſome remedy was here to be applied, and on the continent, and in England, they proceeded differently. On the continent, the king, or ſuperior lord, appointed a *cojudge*, or aſſeſſor. In England the ſuitor, by applying to the king's courts was empowered to remove the cauſe thither; which hath been one great occaſion of theſe inferior courts of the lords dwindling to nothing †.

As to the right the lord had in the land by virtue of his ſeignory, the principal, and upon which his other rights

* Madox, Baronia Angl.

† 4. Inſtit. 268. Scroggs of Courts Baron, p, 56.

out of the land depended, was his *reverſion*. A reverſion is that right of propriety remaining in the lord, during the continuance of the particular eſtate of poſſeſſion of the tenant; whereby he is entitled to the ſervice during the duration of the term, and to the poſſeſſion itſelf, when it is either expired, or forfeited. Hence it appears that the fealty and ſervices of the tenant are incident to the lord's reverſion. Out of theſe reverſions may be carved another incorporeal eſtate, called a *remainder*, which is a particular eſtate dependant upon, and conſequent to a prior particular eſtate; as if lands be granted to A. for five years, and afterwards to B. for life. In this caſe A. hath a leaſe for years, B. a remainder for life, and the reverſion remains in the grantor. In our law, remainders, and the particular precedent eſtate on which they depend are conſidered as making but one eſtate; and ſo, in truth, they are with reſpect to the reverſioner, though not to each other. Therefore they muſt both paſs out of the grantor at the ſame time, though it is not abſolutely neceſſary that the remainder ſhould veſt in the grantee at the creation of the precedent particular eſtate; for a remainder may be good which depends on a contingency, as if a remainder, after a leaſe for life or years to A, is limited to the eldeſt ſon of J. S. This is a good remainder, but a contingent one, depending on the birth of J. S's ſon during the continuance of the term of A; for the remainder being but one eſtate with the precedent particular one, and only a continuation of it, muſt commence inſtantly when it determines. Or, if after a leaſe to A, a remainder is limited to the heirs of J. S. this is a good contingent remainder, depending on the event of J. S. dying during the particular eſtate. For it is a maxim of the Engliſh law *Nemo eſt hæres viventis*.

To return to reverſions, I mentioned fealty and ſervices as incidents of a reverſion; but we muſt diſtinguiſh that fealty is an inſeparable one, which the ſervices are not; for the tenure being from the reverſioner, and fealty neceſſarily incident to every tenure, it is impoſſible they ſhould be ſeparated. A grant, therefore, or fealty, without the reverſion, is void; and the grant of the reverſion carries the fealty with it. But the caſe is otherwiſe as to the ſervices; for the ſervices may be granted without the reverſion, and although the reverſion be granted, the ſervices, by ſpecial words, may be excepted *.

It will be now proper to ſpeak of the remedy the reverſioner hath for the recovery of his ſervices, if they are not paid. In the ancient times the tenant was, at all the due times, at his peril obliged to perform his ſervice; for as each the ſmalleſt failure was a breach of his fealty, his tenancy was thereby abſolutely forfeited, and this long continued to be the caſe in military tenures. But as the defence of the realm was not concerned in the ſocage holdings, but only the immediate intereſt of the lord, it was thought too hard, that every, perhaps involuntary omiſſion, ſhould induce an abſolute forfeiture; when the lord, where his dues were certain, might receive an adequate recompence. Cuſtom, then, introduced the method of *diſtreſs*, in imitation of the Roman law, as the proper method to recover an equivalent for the damages he ſuſtained by the non-performance of the duties. And afterwards, when the perſonal ſervice of the military tenants came to be commuted into a ſum of money called *eſcuage*, diſtreſs came to be the regular method of recovering that and the other fruits

* Coke on Littleton, lib. 2. chap. 12. § 215.

fruits of the military tenure; the damage the lord ſuſtained being now capable of a reduction to a certainty *.

The introduction of diſtreſs on ſocage tenants was thus: When the abſolute forfeiture was thought too ſevere, the firſt ſtep was, that the lord ſhould enter, and hold the lands till his tenant had ſatisfied him as to his damages; but as this ſeizure frequently diſabled the tenant from making that ſatisfaction, eſpecially if he had no other lands, this, after ſome time, was thought ſtill too rigorous, and in its ſtead was ſubſtituted the ſeizure of the cattle, and other moveables found on the land, and the detention of them as a pledge, until the damages were anſwered; which is what we call *diſtraining*. This was a ſufficient ſecurity to the lord, as it rarely happened but that there was ſufficient found to anſwer his demand for one failure; and the tenant was not (as not being deprived of his poſſeſſion) reduced to an incapacity of paying his rent of ſervices, and thereby recovering his pledges. Hence all feudal rents, or, as our law calls them, *rent ſervices*, (being the ſervice the tenant pays to the lord, in conſideration of the land he holds from him) are diſtrainable †.

But there was another ſpecies of rents in our law not diſtrainable; which, therefore, was called *redditus ſiccus*, or *rent ſeck*. This was not a feudal ſervice, not being paid from a tenant to his lord, and was thus: When a man, keeping ſtill his land in himſelf, grants a rent thereout to a ſtranger, the grantor is juſtly bound by his grantee; but the grantee, not being his lord, cannot have this remedy. For the remedy of diſtreſs being ſubſtituted in the place of the lord's right of entry, could not be extended to a ſtranger, who never had

* Madox, Antiquities of the Excheq. vol. 1. p. 652.
† Coke on Littleton, lib. 2. chap. 12.

had that right. And this was originally the only kind of rent ſeck; but the ſtatute called *quia emptores terrarum*, introduced another ſpecies of rents not diſtrainable, by converting rent ſervices into rents ſeck. The liberty of alienation without the conſent of the lords having been allowed before that ſtatute, it became cuſtomary for a tenant who ſold his land, and parted with his whole eſtate in it, to reſerve the tenure of the *vendee*, not to his ſuperior lord and his heirs, but to himſelf and his heirs; whereby he retained many advantages to himſelf, by continuing the vendee's lord, ſuch as the right of eſcheat, if the tenant died without heirs, and the benefit of the wardſhip and marriage, if it was held by knight's ſervice. Now a rent reſerved upon ſuch a ſale to the vender, was, as he continued the vendee's lord, a rent ſervice, and conſequently diſtrainable‡.

But this practice, though highly uſeful to the ſellers, was of conſiderable detriment, not only to their lords, who thereby frequently loſt the fruits of their tenures, but indeed to the whole military policy of the kingdom. It was enacted, therefore, in the eighteenth of Edward the Firſt, by the ſtatute above mentioned, that whenever a man alienated his whole eſtate, the alienee ſhould not hold from him, and be his tenant, but from the ſuperior lord, and be the lord's tenant directly; and that by the ſame ſervices, by which the alienor had holden. The alienor, then, by this ſtatute, ceaſing to be lord, and his right of reverſion clearly gone, if he reſerves a rent on ſuch alienation, he cannot diſtrain for it, and it is a rent ſeck.

Theſe rents ſeck, therefore, were of two kinds, one ariſing by grant, which was the moſt ancient, the other by reſervation, when a man aliened his whole eſtate. For if

‡ Ibid.

if the whole eſtate was not gone, but a reverſion remained in him, a rent reſerved was ſtill, on account of that reverſion, a rent ſervice; as if A. gave lands to B. and the heirs of his body, reſerving rent. As this eſtate tail, although it might continue for ever, yet was capable of determination by the failure of that iſſue, ſuch rent was diſtrainable, for that reaſon, and alſo becauſe, by the ſtatute which gave force to ſuch eſtates tail, the reverſion was ſaved to the donor. But if he had made a leaſe of life or years, or a gift in tail, and had, at the ſame time, conveyed over the remainder in fee, ſo that his reverſion was gone, a rent reſerved on ſuch a grant was *ſeck*.

The inconvenience attending theſe rents ſeck, in their not being diſtrainable, introduced another ſpecies of rents called *rent charges*. Theſe are rents ſeck, armed with a power of diſtreſs by the ſpecial agreement of the parties; and are of two kinds, as the former are created either by *grant*, or *reſervation*. Thoſe by grant, which were the only ſpecies of rent charges before the ſtatute, were thus; as if I grant out of my lands, keeping them ſtill in myſelf, a rent for years, life, fee tail, or fee ſimple, and give my grantee a power to enter and diſtrain for the rent. It will be by reſervation; if I reſerve to myſelf a rent upon a conveyance in fee ſimple, or upon a gift in tail with a remainder over in fee, or upon a leaſe for life or years, with a remainder over in fee, and it is covenanted that I ſhall have a right to enter and diſtrain for the rent. The power of diſtreſs, therefore, in rent charges is good only by the expreſs proviſion of the parties, not by the force of the general law †.

Antiently it was a doubt whether a rent charge could be reſerved upon a *deed poll*; to underſtand which, it will be neceſ-

† Coke, ut ſupra.

neceſſary to explain the difference between a *deed poll* and an *indenture*. A deed poolis a grant from one man to another, and is all and every part of it the act and words of the grantor only; and therefore the deed belongs to the grantee, and there is no counterpart in the hands of the grantor; becauſe the grantee binds himſelf to nothing towards him. Whereas, in an indenture, every clauſe is the act and words of both. They are mutually bound to each other, and therefore there is a counterpart in the hands of each party. Now if A. by deed poll, granted lands in fee to B. reſerving rent, with a clauſe of diſtreſs, it was doubted whether this clauſe was not void, and the rent a rent ſeck; becauſe as the lands by A's grant was in B. it was apprehended they could not be charged with it without an expreſs covenant from him; as in the deed poll he was a party merely paſſive. But it is now held, and that very equitably, that ſuch a reſervation can raiſe a good rent-charge; for his acceptance of the deed upon the delivery is an act ſufficient to ſhew his aſſent to take it on the terms therein contained; and nothing can be more reaſonable than that whoſoever takes a benefit ſhall take it under ſuch conditions, and no other than ſuch as the donor intended.

Thus have I endeavoured to explain the nature of the three ſeveral kinds of rents in our law, of which only rent ſervice is properly feudal; but upon account of the affinity of their nature, I thought proper to join them here. It will be proper now to ſay ſomething concerning the nature of *diſtreſs*, as it was the remedy for recovering the feudal duties in theſe kingdoms.

Diſtreſſes were not only taken for rents, and other ſervices reſerved, but alſo to oblige perſons to appear in courts

courts of juſtice, or to raiſe fines, and amerciaments inflicted on them. This likewiſe aroſe from the feudal law, as by that the doing ſuit and ſervice at the lord's court was one of the duties attendant on fealty.

But there is another kind of diſtreſs allowed by our law, ariſing neither from the feudal contract, nor the expreſs ſtipulation of the parties, but from the *delictum*, or negligence of a ſtranger. It is called a *diſtreſs for damage feaſant*, and is a ſeizure of the cattle, or any other moveable of a ſtranger, treſpaſſing upon or damaging my ground. The law in this caſe will not put me to my action againſt the proprietor, whom perhaps I may never diſcover; but has provided a *feſtinum remedium* for me, by way of diſtreſs; and this diſtreſs is more privileged than others, for it may be taken in the night-time, which other diſtreſſes cannot; becauſe, otherwiſe, the cattle might eſcape, and the goods be removed, and ſo the party injured remain without remedy.

Many and grievous were the extortions and oppreſſions of the antient Engliſh lords in their taking diſtreſſes, during the troubleſome reign of Henry the Third, for the remedying which many wiſe regulations were made by the ſtatute of Marlebridge and others. For they not only diſtrained in a moſt unreaſonable manner for the ſmalleſt duties, but diſtrained where nothing was due; and frequently even out of their fees; and to deprive the parties injured of legal remedy, drove them into another country, or incloſed them in a caſtle, or would not ſuffer their bailiffs to permit a replevin †.

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† Madox, Antiq. of the Exchеq. chap. 15. The Statutes at Marlebridge ap. Ruffhead, vol. 1. p. 30.

Since I am on this head of diſtreſſes, it will be proper to make a few obſervations, *what* may be legally diſtrained, *when*, and *where*, and *how* a diſtreſs is to be demeaned, and what remedy the perſon wrongfully diſtrained hath to recover his property.

Firſt then, nothing can be diſtrained but moveables, and ſuch as may be reſtored in the ſame plight. For the diſtreſs is in the nature of a pledge, to be reſtored on due ſatisfaction made; therefore nothing fixed to the freehold is diſtrainable, as doors, windows, furnaces, &c. for theſe being affixed thereto, are part of the freehold, and cannot be ſeparated thence without damage. Therefore, a ſmith's anvil, though not actually fixed, or a millſtone removed in order to be picked, are not ſubject to diſtreſs; for the one is, in law, ſtill part of the ſhop, as the other is of the mill. Hence, likewiſe, money is not diſtrainable, unleſs it be in a bag; becauſe, otherwiſe, it cannot be known, ſo as to return it in the ſame plight. For the ſame reaſon, by the old law, corn in ſheaves, or in ſtacks, or in a barn, or hay in cocks, or in a loft, could not, for fear of damage in removing. That however hath been ſince altered by ſtatute, but corn or hay on a cart could be diſtrained by the old law; for they being, in ſuch a caſe, found in a ſituation fit for removal, might be tranſported from place to place without any probable danger of damage, or diminution.

Secondly, The inſtruments of a man's livelihood, as the tools of a tradeſman, the books of a ſcholar, the plough-cattle of a ploughman, &c. cannot be diſtrained where any other diſtreſs is to be found; and this for the particular ſafety and benefit of individuals. But this holds not in the

caſe

caſe of *damage feaſant*; for there the identical thing that did the treſpaſs, and that only, muſt anſwer for it.

Thirdly, Things ſent to public places of trade are privileged, for the public benefit of the realm, as cattle in a market, corn ſent to a mill, cloth in a taylor's ſhop, yarn in a weaver's houſe. For it would put a total ſtop to commerce if theſe were anſwerable for the rents of ſuch places.

Fourthly, What is in the cuſtody of law is not diſtrainable, for it would be an abſurdity that a man ſhould have a right by law, to take things out of the cuſtody of the law itſelf, ſuch as goods already diſtrained, or goods taken in execution, or ſeized by proceſs at the ſuit of the king.

Fifthly, Things in manual poſſeſſion of another, are for the time, privileged, as an ax in a man's hand, or the horſe I ride on. But for the damage feaſant, as I ſaid before, every thing is diſtrainable; for the thing itſelf which did the damage, is the pledge of the ſatisfaction, and the only one.

Next let us ſee *how* and *where* they may be taken. The diſtreſs, then, ſhould not be exceſſive, as an ox ſhould not be taken for twelve pence, where other ſufficient diſtreſs might be had, or two ſheep where one was ſufficient; but for damage feaſant, though ever ſo little, the whole may be taken; and likewiſe for homage, fealty, or the wages of members in parliament. As the intereſt of the whole community is concerned in theſe, no diſtreſs can be exceſſive. No diſtreſs can be taken in the king's highway, for it is privileged for the public uſe of the nation. Neither can any diſtreſs be taken by night, unleſs for damage feaſant; for as no tender of rent, or other duty, can be made, or acceptance

ance enforced but in the day-time, perhaps the tenant may, in ſuch caſe, be provided, and ready to tender his duties the ſucceeding morning, and thereby ſave his chattles. Laſtly, by the common law, no man could diſtrain out of his fee, unleſs when coming to diſtrain he had the view of them, and they were driven off to prevent him. But this hath been altered by ſtatute, and now a landlord may follow his tenant's cattle, if conveyed by his leſſee off the land, and diſtrain them within twenty days.

As to the *manner* of demeaning or managing the diſtreſs, it is the duty of the diſtrainor to carry them to a pound, that they may be in the cuſtody of the law. *Pounds* are of two kinds, *overt*, or *covert*; the one for living cattle, the other for other goods that might take damage by the weather. The reaſon why living cattle ſhould regularly be put into a pound overt, is, that, as they are but a pledge, from which, in itſelf, the taker is to receive no benefit; and as the proprietor, therefore, muſt be at the ſole expence of feeding them, he ſhould have the freeſt acceſs to them for that purpoſe; and, in ſuch caſe, if they periſh, the loſs is his; but if they be put into a covert pound, there, becauſe the owner cannot have acceſs, the taker is to feed them, and anſwer for them at his peril.

In antient times, the lords uſed to drive the diſtreſſes into foreign counties, whereby the tenants knew not where to reſort to feed their beaſts. This was forbidden by Marlebridge, cap. 4. However, that act received this conſtruction, that if a manor lay in two counties, and its pound in one of them, the lord might diſtrain in the other county, and impound them in his manor pound; becauſe the tenant, by attending the manor court, was

was preſumed to know every thing tranſacted in the manor. But now, by later acts, no diſtreſs of cattle ſhall be impounded out of the hundred, or barony where taken, except in a pound overt, in the ſame county, within three miles of the place; nor ſhall diſtreſſes be divided, and impounded in ſeveral places. Dead chattels muſt be impounded likewiſe within three miles, and that in a pound covert, otherwiſe the taker is anſwerable for them, if damaged or ſtolen.

As to the *remedy* for taking an unjuſt diſtreſs, the tenant might, if there was nothing due, reſcue them before they were put in pound, and juſtify it; but when once impounded, they were put in cuſtody of the law, and muſt be delivered by law. Or if there was any thing due, he might, before they were impounded, make a tender of ſatisfaction; which, though the caption was juſt, rendered the detention unlawful; and therefore if the beaſts, after ſuch tender, were put in pound, and died there, the taker was anſwerable.

When the goods were once impounded, the remedy was by *replevin*, which is a juſticial writ out of Chancery, directed to the ſheriff, who is judge in this caſe, complaining of the unjuſt taking and detention, and commanding the ſheriff to deliver them back to the owner, upon ſecurity given to make out the injuſtice of the taking or detention, or elſe to return the goods and chattels.

But this method of replevin, by writ out of Chancery, was very inconvenient to the remote parts of the kingdom; as the owner might be put to extraordinary expence and trouble, in maintaining his cattle for a long time. Hence

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it was provided, by the ſtatute of Marlebridge, cap. 21. *Quod ſi Averia alicujus capiantur, & injuſte detineantur, vicecomes poſt querimoniam ſibi factam, ea ſine impedimento vel contradictione ejus qui dicta Averia ceperit, deliberare poſſit* †.

This impowered the ſheriff to make replevins without writ, upon the plaint of the plaintiff in replevin; and this he could do out of his county court, becauſe, as that was held only from month to month, were it otherwiſe, the delay might be as great as in the caſe of a writ of replevin; but then the ſheriff, in order to lay the foundation of the ſuit, muſt enter the plaint the next county court, that it may appear on the rolls thereof.

The ſheriff's duty then was, in the firſt place, to take ſufficient ſecurity *ad proſequendum*, that is, that the plaintiff ſhould make out, in due courſe of law, the juſtice of his writ or plaint, that is, that the cattle or goods were either taken, or detained unjuſtly. He was alſo to take ſecurity *de retorno habendo*, that is, in caſe he failed, that he would return the ſame diſtreſs, that it might be delivered to the taker; and this is by the ſtatute of Weſt. 2.; and he generally, likewiſe, took ſecurity to indemnify himſelf from any action that might be brought againſt him. And then it was his duty immediately to deliver the diſtreſs to the plaintiff in replevin.

Then it lies on the taker or defendant in replevin to *avow*, that is, to ſet forth the reaſons of his caption, to which the plaintiff replies; and ſo the juſtice of the cauſe comes into queſtion, to be legally determined. Thus much is ſufficient, at the preſent, to ſhew the remedy the lord hath

† Ruffhead, vol. 1. p. 37.

hath for his ſervices, by virtue of his ſeignory, and how his tenant is to defend himſelf if unjuſtly diſtreſſed †.

I might here treat of another fruit of the lord's ſeignory, which is the *right of eſcheat*, or the lands falling back to the lord, either for the *delictum* of the tenant, or the failure of blood; but as, to underſtand this laſt properly, we muſt know who are inheritable, it will be more proper to defer it till after we have treated of *inheritances*.

† Glanvel, lib. 9. c. 8. lib. 10. c. 3. lib. 11. c. 4.

LECTURE XI.

The manner in which eſtates for life came to be enlarged into deſcendible eſtates—The nature of Reliefs—Feudal oppreſſions—The admiſſion of allodial lands into the feudal policy—The extenſion of the feudal ſyſtem in France.

THE feudal lands having been changed by degrees from tenancies for years into permanent grants for life, partly by the neceſſities, and partly by the favour of the lords, the matter did not ſtop here; but, to the advantage of the vaſſals, their rights were continually gaining ground, and inſenſibly extending themſelves, to a durable continuance in the ſame family. To this, undoubtedly, the number of allodial eſtates, which were eſtates of inheritance in the hands of the Romans, greatly contributed. For it is not to be imagined that it could be an agreeable ſpectacle to the conquerors, when once they were ſettled, and ſecured in the poſſeſſion of the country, to behold their poſterity in a more precarious ſituation, with regard to property, than the vanquiſhed were. It is true, as by their conſtitution the lord was obliged to provide every gentleman, that is, every one of their nation, unleſs he proved unworthy, with a benefice, there was no danger of their iſſue not being ſupplied, in ſome degree or other. But this did not ſatisfy them †.

Their

† Houard, Anciennes loix des Francois conſervées dans les coutumes Angloiſes, tom. 1. p. 32. et ſeq. Craig, lib. 1. dieg. 4.

Their roving manner of life being antiquated, and the practice of removing them from place to place every year being ſuperſeded by gifts for life, the poſſeſſors, by habitude, became fond of their dwellings, and no longer contented with bare neceſſaries, ſtudied to render their ſituation commodious and agreeable. They built houſes of ſtrength and convenience, and by their ſocage, tenants and villains planted and improved their lands. And now it began to be thought ſevere, that the benefit of their improvements, and the fruit of their and their dependants toil and labour, ſhould go to ſtrangers, or even to the lord himſelf. For before this time it had began, and was now grown into a common practice, for the lords, when they gave an eſtate for life, not to content themſelves merely with future ſervice, but to exact, at the time of their inveſtiture, an *honorary fine* from the tenant; and this, being but moderate, was generally complied with, in order to gain a permanent eſtate. The intereſt of the ſtate, which was concerned in the improvement of particulars, required alſo a preference of the deſcendants of thoſe that made them. It is no wonder, therefore, that it grew to be a maxim, and univerſal opinion among theſe people, that the not continuing the ſon in the poſſeſſion of his deceaſed father, though it was in the lord's power to remove him, was a great hardſhip, and an unworthy act in the lord †.

With theſe general ſentiments, the lords, for their own intereſt, were obliged to comply, and eſpecially the kings; who, by the frequent diviſions of the monarchy in France, had competitors to guard againſt; and were, therefore,

† Bracton, lib. 2. c. 36. Hume, append. 2. Du Cange, voc. relevium. Spelman, voc. relevamen. Reliq. Spel. p. 32, 33.

enforced to attach their vaſſals to them in the ſtrongeſt manner, by complying with their inclinations. The ſons, therefore, or one of them, generally ſucceeded; not in virtue of any inherent right, but by a new gift, through the favour of the lord. For, upon the death of his vaſſal, the eſtate being expired, the lord took poſſeſſion, and, upon receiving a fine, made a new grant, by inveſtiture, as of a new eſtate, to ſuch an one of the ſons as he choſe; or he divided it among them at his pleaſure. Theſe fines for continuing the fiefs in the ſame family were called *relevia* or *reliefs*, from the Latin word *relevare*, which ſignified a ſecond lightening, or removing the hand of the lord, who had ſeized the benefice upon its vacancy, by the death of the former poſſeſſor. Hence the ſon had no right to continue his father's poſſeſſion. He was obliged to petition for a new inveſtiture, and to tender his relief, and himſelf ready to take the oath of fealty. Theſe reliefs were originally paid in arms, being the moſt valuable property theſe military people had, and afterwards were converted into money. The *quantum* was originally at the lord's will; but his own intereſt, from the motives already hinted, commonly prevented him from being exorbitant. This preference to a ſucceſſion being at firſt a matter of favour, not of right, ſome vaſſals, by degrees, obtained of their lord, in their inveſtitures, an abſolute right of ſucceſſion to their ſons; which bound the lord and his heir; and that in theſe two different manners. It was either by a grant to the vaſſal, and one or more of his ſons by name; and then thoſe omitted were excluded; or *to him and his ſons* generally; and then, by the feudal law abroad, they were all admitted to enjoy in equal portions, in imitation of the Roman law, which admits all the children in that manner.

But

But the words of the grant were not extended, by a favourable conſtruction, to take in grandſons by the name of ſons, for the following reaſon. When a grant was made to a man and one or more of his ſons by name, the ſons were originally, at the time of the inveſtiture, capable, or ſuppoſed capable, by the lord's admiſſion, of doing the ſervices of the feud; and their ability and merit was in the contemplation of the grantor, and part of the conſideration of the grant; and where it was given to a man and his ſons generally, the law preſumed the ſame thing, the ſame capacity in them, the ſame intention in the grantor. But in the caſe of grandfather and grandſon, the law could not preſume ſo, it being contrary to the ordinary courſe of nature, that both ſhould, at the time of inveſtiture, be capable of doing the ſervices in perſon; and therefore the grandſons, unleſs ſpecially provided for, were excluded †.

Thus a right of ſucceſſion for one ſtep was gained by the expreſs proviſion of the parties, in particular caſes. But as the lord, where he continued the ſucceſſion out of favour, entered into the lands, and parted not with them without payment of his relief by the ſon, it was reaſonable in this caſe, where he poſitively bound himſelf, that theſe advantages ſhould be reſerved to him. Therefore the heir could not enter, but was obliged to petition his lord *humiliter* and *devotè*, and to offer his fealty and relief; and the intereſt of the lord and of the ſtate requiring the place of the deceaſed vaſſal to be ſpeedily filled up, a year's and a day's time was allowed for this application; within which ſpace, if the heir did not apply, unleſs prevented by ine-

 vitable

† Fleta, lib. 3. c. 77. Feud. lib. 1. tit. 1. Dalrymple on feudal property, ch. 5. Madox, antiq. of the Exchequer, ch. 10. § 4.

vitable neceſſity, he forfeited his right of ſucceſſion, and the lord was at liberty to diſpoſe of it to a ſtranger.

Reliefs, however, being, in their original creation, arbitrary, it ſhould ſeem to be in the power of the lord, where the quantity was not ſpecified in the tenor of the inveſtiture, to defeat his own grant, by demanding, under that name, more than the value of the land, or otherwiſe grievouſly to diſtreſs his tenant. This, in England particularly, occaſioned many ſtruggles. It appears from the laws of William the Conqueror, that, in thoſe times, the reliefs were fixed according to the different ranks of the perſons, and paid in horſes and armour, in imitation of heriots in the Saxon times; but his avaricious and tyrannical ſon William Rufus laid claim to, and exacted arbitrary reliefs, to the great diſcontent of all, and to the impoveriſhment of many of his ſubjects †. This was redreſſed in Henry the Firſt's charter, where the firſt chapter ſays, *Si quis baronum, comitum, ſive aliorum qui de me tenent mortuus fuerit, heres ſuus non redimet terram ſuam ſicut faciebat tempore fratris mei, ſed legitima, & certa relevatione relevabit eam, ſimiliter & homines baronum meorum, legitima, & certa relevatione relevabunt terras ſuas de dominis ſuis* ‡. Henry the Firſt, however, was a man little inclined to keep any engagements with his people that he could free himſelf from; and therefore reliefs went on in an arbitrary way, for the moſt part, under him, though not in ſo oppreſſive and extorting a manner as his brother William had uſed. For in his grandſon Henry the Second's reign, in whoſe time the feudal payments became generally converted into money, we find, from Glanville, that the relief of a knight's

† Wright on tenures, p. 95, 96.

‡ L L. Hen. I. c. 1.

knight's fee, indeed, was reduced to a certainty, but that of a noble fee was not. *Dicitur autem rationabile relevium alicujus, juxta conſuetudinem regni, de feodo unius militis, centum ſolidos;—de baroniis vero nihil certum ſtatutum eſt, quia juxta voluntatem & miſericordiam domini regis ſolent baroniæ capitales de releviis ſuis domino regi ſatisfacere* ‖.

It ſeems a little odd, that the lower military people had got ſuch an advantage above the great and powerful lords; but this may be accounted for from the number of the knights, who made the ſtrength of the kingdom, and were not to be diſobliged; and alſo from the precarious ſituation many of the great lords were in, who had been attached to the cauſe of Stephen. However, the wiſdom and moderation of this great prince was ſuch, that we find no complaints on this head, during his reign, or that of his ſon Richard; but when John aſcended the throne, a prince who hated, and was hated by his nobles, the old oppreſſions were renewed, and aggravated to ſuch a degree, that the remedying thereof is the firſt article of temporal concern in Magna Charta †.

There it is provided, *Si quis comitum, vel baronum noſtrorum, ſive aliorum tenentium de nobis in capite per ſervitium militare, mortuus fuerit, & cum deceſſerit, heres ejus plenæ ætatis fuerit & relevium nobis debeat, habeat hereditamentum ſuum per antiquum relevium; ſcilicet, heres, vel heredes comitis de comitatu integro per centum libras, heres vel heredes baronis de baronia integra per centum marcas; heres vel heredes militis de feodo militis integra per centum ſolidos ad plus: Et qui minus habuerit minus det, ſecundum antiquam conſuetudinem feodorum* ‡. And now were all reliefs reduced to a certain

‖ Lib. 9. c. 4.
† Madox, antiq. of the Exchequer, ch. x.
‡ Ruffhead, vol. I. p. 2.

certain ſum of money, namely, the fourth part of what was then reckoned the value of the inheritance; for a knight's fee was then reckoned at twenty pounds, a barony at four hundred marks, and an earldom at four hundred pounds per annum. And by the gradual ſinking of the value of money, and the riſing of lands, theſe payments continuing the ſame, came in a few centuries to be not the twentieth part of the value. We ſee by the words *per antiquum relevium, & ſecundum antiquam conſuetudinem feodorum*, how careful the lords were to have this certainty of relief acknowledged as their antient right, and not to accept it as a conceſſion from the crown. When the military lords began, in imitation of the eſtates they themſelves had, to grant inheritances to their ſocage tenants, they likewiſe exacted, in the nature of a relief, from every new poſſeſſor a year's value; or, in other words, the rent of the firſt year was doubled. For a year's value was what was, in France, at the beginning, paid for military tenures, by the name of *rachat* or *repurchaſe*, anſwering to our relief, until at length they were reduced to a certainty in money; and, conſequently, from the ſame cauſes as in England, though remaining nominally the ſame, they ſunk to be very inconſiderable ||.

Eſtates of ſucceſſion, as I obſerved, aroſe firſt from private grants, and that for one generation only; but they were continually extending to further lengths, and encreaſing in number; inſomuch that, fiefs falling vacant much ſeldomer than before, the king had it not in his power to gratify his deſerving ſoldiers ſo frequently as he ſhould, and the crown was conſequently enfeebled. This then ſtarted the notion of ſuch grants being good only during the

|| Bracton, lib. 2. fol. 86.

the life of the king or lord who made them, and not binding on his ſucceſſors. Upon this plan, Brunechild, in her regency, during the minority of her infant ſon, attempted to revoke them, and actually did revoke ſeveral; which at length raiſed that flame, and cauſed that revolution, in which her ſon and herſelf miſerably periſhed. What ſhews the violent indignation her venturing on this ſtep occaſioned, was the horrid manner of her death, that of being torn aſunder by four wild horſes. Clothair the Second, who ſucceeded, was wiſe enough by law to confirm theſe eſtates; and then, namely about the year 613, the former doubt was removed, and all theſe eſtates of inheritance confirmed to continue againſt the ſucceſſor, according to the terms of the original inveſtiture. New grants were continually made, and for more generations than had been formerly practiſed. But yet this rule of deſcent was not general; but all grants, unleſs heirs were ſpecially named, were but for life; as it is in our law, in which a *feofment to a man for ever*, is but an eſtate for life for want of words of inheritance †.

What greatly contributed to the extending theſe grants to indefinite generations, was the inclination that now ſeized the Romans and Gauls who held allodial lands to be admitted into the feudal policy, by becoming vaſſals to the king. They had long lain under very humiliating diſtinctions. They were no members of the ſtate. The loſs of their lives, and other injuries, were compenſated only by half the ſatisfaction to a Frank. For neglect, or contumacy, when called into the king's courts, they were reputed guilty, and forfeited their eſtates; whereas a Frank was only impriſoned to oblige him to anſwer. When accuſed

† Monteſquieu, l'Eſprit des Loix, liv. 31. chap. 1.

accuſed of the lighteſt crimes, they were put to the ordeal; whereas the Franks were only ſubjected thereto in caſe of murder. And many other were the diſtinctions between the allodial and feudal tenants. No wonder then the former were very deſirous of enrolling themſelves among the conquerors, which when they had at length obtained, their liberty was effected, by their giving their allodial lands, or a part of them, to the king, and receiving them back, ſubject to the feudal rules. Now were they immediate vaſſals of the king, and, as ſuch, became Franks to all intents and purpoſes. But theſe people were not ſo fooliſh, nor could it be expected from them, to part with abſolute inheritances, and take back only an eſtate for life. They inſiſted upon grants for a perpetuity, at leaſt for as long as the iſſue male of the perſon reſigning laſted. When once theſe donations were become common, we may be aſſured the Franks were very ready to follow the example, and to take all advantages either of the favour, or the weakneſs of their kings; and to ſuch a number did theſe inheritances increaſe, that, about the year 730, the kingdom was near being loſt to the Saracens, for want of a ſufficient number of beneficiary or life-eſtates, to encourage the ſoldiery †.

At the time the kings of France were merely nominal, and the whole adminiſtration in the hands of the *maires du palais*, of whom the ſecond, who had obtained this unlimited authority, Charles Martel, was ſo happy as to ſave the kingdom from thoſe African invaders in a battle near Tours, wherein they were routed with a ſlaughter almoſt incredible: It remained to reward the victorious fol-

† St. Amand on the legiſlative power of England, p. 27. Monteſquieu, l'Eſprit des loix, liv. 31. ch. 8. Dr. Robertſon's Charles V. vol. 1. p. 222.

ſoldiers, who were at leaſt as much animated to their exploits by his previous promiſes, as by their affection to the antient conſtitution of the ſtate, which was now in truth deſtroyed, the kings of the royal race being mere phantoms, whoſe names he and his father had made uſe of at their pleaſure. But this family had not acquired ſufficient weight and authority to act as maſters. The fund of lands, out of which benefices had been formerly given, was almoſt exhauſted, and the major part of the lands that were not ſtill allodial, was alienated either in perpetuity to the church, as atonements for the vices of the former kings, or what was near a perpetuity to the lords, for many deſcents. Theſe laſt he could not deſpoil. They were too firmly eſtabliſhed by cuſtom and law; and he and all his predeceſſors had paved their way to greatneſs, by ſupporting theſe hereditary grants at the expence of the crown. Neceſſity therefore obliged him to make free with the lands of the church; for which, in their viſions, they lodged him in a chamber, the very loweſt in hell. Of theſe lands the greateſt part he converted into benefices of the antient kind, for life only; and by means of the number of thoſe new ones, added to the old ones, that were in the ſame ſtate, ſome kind of a balance was formed; which for a time ſupported the government, and checked the growth of inheritances. But it is remarkable, that, of thoſe church lands, ſeveral he gave as allodial ones. I will not pretend to ſay, that, in this diſtinction, he conſidered the antient nature of the lands of the church, ſome of which came from feudal, others from allodial proprietors. It ſeems rather probable, as the allodial eſtates were greatly decreaſed, by being turned into fiefs of inheritance, he was inclinable to form a kind of equality between the feudal tenants, the beneficiaries, and the allodians; that, by managing them, he might advance his family

family to the title, as well as power of royalty; which we find was ſoon afterwards accompliſhed by his ſon Pepin †.

The policy of Pepin and his ſon Charlemagne correſponded with Charles Martel's views. The former allowed the continuance of inheritances according to the original proviſion in the creation, but were much fonder of the beneficiary eſtates, and Charlemagne made ſeveral laws to prevent his beneficiaries from converting by any art their intereſts into inheritances. In his time, a great majority of eſtates were benefices; but this I preſume is not to be underſtood of France particularly, where, from the detail before mentioned, it could ſcarce be, but of his whole empire. For in his acquiſitions, and eſpecially in Germany, where ſuch a practice was agreeable to the antient cuſtoms of the natives, ſuch a regulation was conformable to the found policy of his father and grandfather; by which they endeavoured to reſtore the ſplendour of the old French monarchy, I mean with exception to the large gifts he gave to the church on the borders of the infidels, in atonement for his grandfather's ſacrilege, and in hopes of converting thoſe barbarians, and thereby civilizing them, and making them good ſubjects.

But the ſucceſſors of Charlemagne had neither the power nor the underſtanding of their anceſtors. No wonder then, that, under them, the general inclination of the ſubjects to change their benefices into fiefs gained ground. The diviſion of the empire, and frequent wars between the

† Mably, obſervations ſur l'hiſtoire de la France, tom. 1. l. 1. ch. 5. and 6. Monteſquieu, l'Eſprit des loix, liv. 31. ch. 9.

the brothers, weakened the royal authority, and ſtrengthened their vaſſals; who, at the times of their kings diſtreſs, were rather to be entreated than commanded. In the time, therefore, of his grandſons, we find laws, that, conforming to the inclination of the vaſſals, did in time put an end to beneficiary eſtates, holden from the king; opened the gate to *ſubinfeudations*, and all its extenſive conſequences; and raiſed a new kind of polity never before ſeen in the world, the *feudal* one, ſuch as it reigned about the year 1050 on the continent, and was introduced into England by William the Conqueror †.

I ſpeak of the times of Charles the Bald, who reigned about 860. One of his laws gave leave, and an unlimited one, to the allodians, to ſubmit themſelves and their eſtates, in the nature of fiefs, to others beſides the kings. Nothing could contribute more to the weakening of the royal power, and the throwing of all the weight into the barons' ſcale. Before they could be made Franks, only by becoming the immediate vaſſals of the king. This was equally for the public benefit of the ſtate, the king, and the allodians. But when once the barrier was thrown down, in thoſe times of confuſion, the allodians were glad to gain the protection of the neighbouring lords, and, under colour thereof, detached themſelves from their former ſubjection to the counts, who were the king's officers over them.

Another law, of equal conſequence, was to entitle the fee of a beneficiary, who had only an eſtate for life, without

† Spelman on feuds and tenures. Mably, obſervations ſur l'hiſtoire de France, tom. 1. l. 2. ch. 3, 4, 5, 6. Monteſquieu, l'Eſprit des loix, liv. 31. ch. 28, 29, 30, 31. Houard, anciennes loix des Francois, liv. 1. ch. 1. Baſnage, coutume de Normandie, tom. 1. p. 146.

out any expreſs agreement for a longer continuance, to go to the ſon. This was extorted by the circumſtances of the times, and perhaps then was thought of little conſequence, as it only continued them for one generation. But the temper and general inclination of the people were not to be controuled. Thoſe grants that had been ſo long as two generations in a family, it was ſometimes dangerous, always invidious not to continue; and thus the ſucceſſors often obtained permanent eſtates, when nothing leſs was intended at the beginning. And this was eaſily obtained, as the uſe of letters was not common among theſe people, and their charters were, by frequent rebellions, liable to be deſtroyed.

The laſt law I ſhall mention, is that declaring, that the ſons of counts, who were the king's officers over the *allodianée*, and were originally for years, after for life, ſhould ſucceed to their father. This put the finiſhing ſtroke to the beneficiary eſtates. For though this, in appearance, was, as the former, but for one life, and conditionally; yet, from the prevailing principles, it was impoſſible they ſhould not grow up into inheritances. And as all inheritances were growing feudal ones, and upon thoſe conditions, and no others given, theſe counties became fiefs. The demeſnes of the crown within them became the demeſnes of the count, and all the allodiaries were now become his ſub-vaſſals †.

We are come to the dawn of a ſtrictly feudal monarchy; and, to ſhew the gradation, I have, in this lecture, taken

† See the authorities quoted above, and Selden's titles of honour, part 2. chap. 5.

taken in a great compaſs of time. But before I proceed further downwards, it will be proper to return a little back as to the order of time, and to ſpeak of the conſequences that attended the introduction of eſtates of inheritance. Of one of theſe, *reliefs*, I have already ſpoken in this lecture; but there are many others that muſt be taken notice of.

LECTURE XII.

Conſequences attending the introduction of eſtates of inheritance—The incident of homage—Differences in England and the Continent, with regard to the ceremonies of homage and fealty—The fine of alienation—Attornment—Warranties—Wardſhip in chivalry.

HAVING already, in my laſt lecture, taken notice of *relief*, which ſprung up immediately with eſtates of inheritance, and was their immediate conſequence, it is proper now to proceed to the other fruits of this tenure, which grew up not ſo ſoon, but in after times: and the firſt to be conſidered, as undoubtedly the next to relief, if not coeval with it, is *homage*; which, Littleton ſays, is the moſt honourable ſervice (that is with reſpect to the lord, and the moſt humble ſervice, that is with reſpect to the tenant, that a freeholder can do to his lord) as upon the introduction of eſtates for life, the ceremony of fealty was introduced, ſo was it thought reaſonable, when a further ſtep was taken, that of continuing them to heirs, that a new ceremony ſhould be invented, diſtinct from the former; which being performed publicly, in the preſence of the *pares curiæ*, ſhould, in thoſe illiterate ages, create a notoriety, that the tenant had a more durable eſtate than a freehold. The manner of performing homage is thus diſtinctly deſcribed by Littleton. When the tenant ſhall make homage to his lord, he ſhall be ungirt, (that is, unarmed) and his head uncovered, and his lord ſhall ſit, and the tenant ſhall kneel before him

him on both his knees, and hold his hands jointly together between the hands of his lord, and ſhall ſay, *Thus I become your man* (from which word *homo*, *homagium*, and *hominium* are derived) *from this day forward, of life and limb, and of earthly worſhip, and unto you ſhall be true and faithful, and bear your faith, for the tenements that I claim to hold of you, ſaving the faith that I owe to our ſovereign lord the king;* and then the lord ſo ſitting ſhall kiſs him. Theſe are the words of Littleton, and they are juſt in the caſe he puts of a tenant doing homage to an inferior lord, and who had no prior lord; but if he had a prior lord, or the homage was to be done to the king, there was a difference in the form; for if the tenant had a former lord, he alſo was to be excepted, that the new lord might have notice of the tenant's prior obligation, and that it was not in his power to do abſolute perſonal ſervices at all times to him. And if the homage was done to the king, who acknowledged no ſuperior, then the exception was entirely omitted; but if to a ſubject, it was ſo obſolutely neceſſary that an omiſſion of it was looked upon as an attempt againſt the royal dignity, and done in diſheriſon of the crown. And accordingly we find, that Edward the Firſt, in the ſixth year of his reign, brought an action of ten thouſand pounds, damages, now at leaſt in value thirty thouſand pounds againſt the biſhop of Exeter, for taking homage of thirteen of his biſhop's vaſſals, without the exception of the king; and, in the end, judgment was given againſt the biſhop †

Our antient authors tell us, that the lands for which the homage was done ought to be ſpecified in the doing homage; and the reaſon given is, *Ne in captione homagii contingat dominum, per negligentiam, decipi, vel per errorem.* But

† Coke on Littleton, lib. 2. ch. 1.

But it was better to ſay, that it was for the benefit both of lord and tenant, and for the information of the *pares curiæ*, who were to judge in caſe of any controverſy between them.

In England the two ceremonies of homage and fealty were kept diſtinct; the homage, as being for the moſt durable eſtate, was performed firſt, and afterwards the fealty; but, on the continent, at leaſt in ſome countries, I find they were blended together, by the homage being done upon oath.

Another difference between England and the continent was, that, in England, no homage was repeated to the lord's heir, by a tenant who had himſelf performed it to the anceſtor, but homage once from the tenant was ſufficient for his life; whereas, in France, new homage by the ſame tenant was done on the death of the lord, as we may ſee plainly by many inſtances, in the caſe of the kings of England and France, for the lands the former held in the latter country. Homage was the ſymbol of a ſtrict and indiſſoluble bond between the bloods of the lord and tenant, by which they, and the heirs of their blood, were mutually diſabled from doing any thing to the prejudice of the other party. The tenant, therefore, could not alien, either by laſt will or by deed, in his life-time, without the previous conſent of the lord. This maxim was eſtabliſhed partly in favour of the blood of the firſt tenant, which was, in fact, often the conſideration of the original grant, as when the lord gave lands in marriage with his daughter, or to a ſon or a brother, (and even where it was not in truth ſo, the law preſumed the blood of the firſt tenant was in contemplation on the ſtrength of this maxim, *fortes cerantur fortibus*

fortibus et bonis, and the probability that a gallant warrior would, by a proper education, qualify his ſon for the ſame profeſſion) and partly alſo in favour of the lord, that he ſhould not be obliged to receive, as his tenant, a perſon that was inexpert in war; or that, if qualified, was, perhaps, an enemy to the lord, or that was previouſly vaſſal and bound to another lord who was an enemy. For in thoſe troubleſome times, the power of the crown of France, where theſe rules began, being greatly diminiſhed, every lordſhip made a little kind of ſtate in itſelf, frequently at open war; and when not ſo, at leaſt in a ſtate of ſuſpicious peace with its neighbours; and from this ſtate of things it happened, that the word *feud* has come in our common language, to ſignify a mortal quarrel, as being almoſt inſeparable from the greater, or even leſſer fiefs †.

In thoſe times, the lord, when things grew into a more ſettled ſtate, took advantage of this maxim, that the tenant ſhould not alien without licence, and the tenants readily acquieſced, under the ſubſiſtence of the rule, as it permitted them, in their turn, to exact a fine from their under tenants, or the alienees of ſuch in all caſes of ſubalienation; by which means this fine at length became an eſtabliſhed fruit of tenure. In England, however, it ceaſed in the caſe of lords that were ſubjects from the time of the ſtatute called *Quia emptores terrarum*, which gave every perſon a free liberty to ſell his lands: but the king not being named in that ſtatute, according to the well-known legal maxim, was not bound thereby; and of courſe was paid fines for alienation, or by ſubſequent ſtatutes a commutation for

† Houard, anciennes loix des Francois, liv. 2. ch. 1. Du Cange, voc. Hominium. Spelman, voc. Homagium.

ſuch fines by his military tenants *in capite*, to the time of the Reſtoration, when theſe tenures were entirely aboliſhed. On the other hand, the lord was not permitted to alien, even with the conſent of his ſuperior, without the conſent alſo of his tenant, and that for a ſimilar reaſon. For if he, the lord, might ſo do, he might ſubject his tenant to one who was the tenant's mortal enemy, and perhaps for no other reaſon than for ſerving his former lord faithfully againſt the new one *.

This laſt maxim once eſtabliſhed, introduced the practice of tenants *attorning* to their lords grants of the ſeignory. *Attornment* is an act of notoriety, originally performed in the preſence of the *pares curiæ*, ſignifying the tenant's conſent, and turning over from his former lord to the new one, and the putting him, the new one, in the ſeizin of his ſervices. This, at firſt, was merely voluntary in the tenant; but when, in England, free alienations were allowed by the aforeſaid act, it was not thought reaſonable that it ſhould be in the tenant's power to defeat his lord's grant, by refuſing to attorn. He was therefore obliged, by an action called *Quid juris clamat*, to appear, and to ſhew forth what title he had in the ſaid lands, and whether he had any ſufficient cauſe why he ſhould not attorn to the grantee; and if he could not ſhew any, he was obliged by the judgment of the court to attorn †.

Another effect of this homage was *warranty*, which is the obligation on the lord to defend his tenant in the lands holden

* Wright on tenures, p. 154. et ſeq. Dalrymple on feudal property, chap. 2. § 2. Millar on the diſtinction of ranks in ſociety, ſecond edit. p. 215.

† Wright on tenures, p. 172.

holden of him; or, if he cannot, to give him a recompence of equal value in other lands, our law went no farther; but the feudal law, if the warrantor had no lands to give in exchange, obliged him to pay the value in money. *Warranty* is derived from the word *war*, becauſe, in thoſe real actions, the trial was of old by combat. This obligation, indeed, ſubſided, as I have already hinted, long before the introduction of hereditary eſtates; but when theſe hereditary eſtates became common, and all the military tenures were of this ſort, and eſtates for lives and years were only, or for the moſt part, ſocage, theſe laſt had no warranty annexed to them by law, but only by ſpecial agreement; and the warranty I am now ſpeaking of was confined to inheritances, and of thoſe only to ſuch as were held by homage *auncеſtrel*, that is, where the tenant and his anceſtors, had, from time immemorial, done homage to the lord and his anceſtors. Here, on account of the continued connection between the blood of both families, the law obliged the lord and his heirs to warrant the lands to the tenant and his heirs *.

The manner of taking advantage of this obligation of the lords by voucher, which ſtill remains in our law, (the other method by diſuſe being antiquated) was ſhortly thus: When the tenant in poſſeſſion is impleaded for the lands by a ſtranger, who claims them as his inheritance, he, the tenant appears, defends his right, and *vouches*, that is, calls in his lord to warrant the lands to him. If the lord appears gratis, and enters into the warranty, as he ought, if he is bound to warranty, the tenant hath no more to do in the defence of the ſuit. It is the lord's buſineſs. Againſt him the ſtranger declares, and proſecutes the ſuit.

* Coke on Littleton, lib. 3. chap. 13.

He defends, and it is found againſt him, either by legal trial, or default, for want of appearing; and the judgment the court gives is, that the demandant or ſtranger ſhall recover the lands demanded againſt the tenant, and that the tenant ſhall recover lands of equal value from the lord, or voucher, as he is termed, becauſe he is *vocatus*, or called in to take upon himſelf the defence. If the lord, who is to warrant, doth not appear, he is ſummoned till he does; or if he appears, and will not enter gratis into the warranty, the tenant is to ſhew how the perſon he calls in is bound to warrant; which muſt be either by homage aunceſtrel, or by his, or his anceſtors expreſs covenant, as I ſhall hereafter ſhew; and until this was determined, the ſuit of the demandant was ſuſpended; becauſe as yet it was uncertain who was obliged to defend the lands. So we ſee in the judgment of this kind, there were in fact two judgments, one againſt the tenant, who was to give up the lands, another againſt the lord, who was to give lands equal in value. But there might be three or more judgments, as there might be two or more vouchers, As if there be in reſpect to land, A, B, and C, A, lord paramont or ſuperior, B *meſne*, that is, tenant to A, and lord to C; and C tenant *paravaile*, that is, the actual poſſeſſor of the land. Here, if D, a ſtranger, brings his action againſt C, the tenant, who vouches his lord B the meſne, who enters into warranty, and vouches A the lord paramont, who enters into warranty, and fails, D recovers the lands from C, C recovers in value from B, and B recovers in value from A, and ſo on, if there be more vouchers.

Warranties, as I hinted before, are of two kinds, *warranties in law*, or by homage aunceſtrel, or by words in the deed, which the law conſtrues to import warranty (which

ſtood

ſtood upon a feudal footing), and *warranties in deed*, that depend on a ſpecial covenant. Theſe laſt were ſubſtituted in the place of the former. For as by every alienation, either of the lord or tenant, the mutual connection between the two bloods was extinguiſhed, and warranty by homage auncestrel conſequently gone (inſomuch that now, by frequent alienations, there is no ſuch thing left) the tenant would not attorn to his lord's grant when the lord aliened, nor a new tenant accept of a grant from an old tenant of his tenancy, without an expreſs warranty, binding in the firſt caſe the new lord and his heirs; in the latter the old one and his heirs. Afterwards the making of theſe warranties was extended to perſons between whom there was no feudal connection; as if a man aliened lands to hold of his lord. Here the grantee held of the lord of the grantor, not of the grantor; and therefore, as he had nothing to bind the lord to warranty, would inſiſt on an expreſs warranty from the grantor and his heirs *.

One ſpecies of theſe warranties, namely, that which is called *collateral warranties*, was made uſe of, and it was the firſt invention that was made uſe of, to elude the ſtatute of Edward the Firſt, *De donis*, which gave birth to, or rather reſtored to life that ancient kind of feudal eſtate which we call *Fee tail*. But it muſt be owned this intention was both againſt the words and intention of that law. A judge in his grandſon's, Edward the Third's, reign, ſays, they were wiſe men that made this ſtatute, and that the king that paſſed it was the wiſeſt king that ever was in England, and both aſſertions muſt be allowed. The nobles who made it were wiſe men in their generations. For, by making effectual theſe gifts in tail, they ſecured their

* Houard, anciennes loix des Francois, liv. 3. chap. 13. Coke, ut ſupra.

their eſtates in their families, free from any forfeitures, ariſing from their own miſconduct; which before their eſtates were liable to. But at the ſame time it was a deſtructive law for the nation. It put the great lords of England, who were before too powerful, in a condition, by this ſecurity of the inheritance's deſcending to the heirs, to beard and awe the crown, and it likewiſe diſcouraged induſtry and commerce, which then began to rear their heads in England. Perhaps the wiſdom of that ſageſt of the kings of England, as he is univerſally called, may by ſome be doubted in this, that he conſented to this act; but he was a ſage king, and did wiſely in conſenting to it. The barons had been ſo oppreſſed in his father's reign, and their eſtates ſo often confiſcated, that a mutual jealouſy ſubſiſted at that time between them and the crown. They had been reſtored becauſe the crown was otherwiſe in danger. They were jealous likewiſe of Edward himſelf, for one or two of his actions: In ſhort, his barons were too powerful to be refuſed this law, however contrary to the intereſt of the crown and the lower people, and there was more to be ſaid in its favour, it being entirely agreeable to the feudal principles, that he who received an eſtate to him and the heirs of his body, ſhould not have it in his power to contravene, by any act of his, the gift of the donor. He complied therefore with a good grace; but his wiſdom, if it was ſeen in his complying, was farther ſeen, and in a ſtronger light, in the conſtruction his judges and their ſucceſſors made of this act, that collateral warranty, without an equivalent, ſhould be a bar. However, this was but a feeble defence againſt the miſchiefs of entails, which every day happened, to the weakening of the public eſtates, and collateral warranties, were not on every occaſion ſo eaſy to be got *.

At

* Wright on tenures, p. 168, 169.

At length, in Edward the Fourth's reign, under pretence of warranties, and thoſe entirely fictitious, a method was found out, under the form of legal proceedings, to defeat eſtates tail, and all remainders thereon, and that in the manner following: A, who was tenant in tail, was impleaded by colluſion, by a perſon who pretended to claim title to the lands antecedent to the eſtate tail, and who was, in fact, the man to whom A, by his private agreement, was to alienate it, in deſtruction of the eſtate tail. A appears, and takes defence, but vouches to warranty B, a man who has not a foot of land, nor is likely to have any; B very readily enters into the warranty; and when the day comes, that he ſhould defend the ſuit, makes default; in conſequence whereof, the court gives judgment, that the demandant ſhould recover the lands againſt A, and A's lands of equal value againſt B the vouchee, who hath none; and yet this was judged a good bar to the entail, upon the poſſibility that B might purchaſe lands equivalent, and ſo A, and the other perſons entitled in tail, might receive ſatisfaction. And that is what, under the name of a common recovery, is grown to be one of the common aſſurances of the realm; and though, for about ſeventy years, the juſtice and conſcientiouſneſs of it was diſputed, yet being conſtantly aſſerted as law by the judges, and taken notice and approved of by acts of parliament, it is the now moſt effectual bar to an eſtate tail. To ſpeak candidly about theſe recoveries, as to their application to this purpoſe, they were notorious breaches of the ſtatute *De donis*, under the colour of legal proceedings. Yet what could be done? the law could not be repealed; for all members of parliament had their eſtates entailed. It could only be eluded, and both for the king and all who had not eſtates tail, it was neceſſary it ſhould †.

Another

† Wright on tenures, p. 186.

Another conſequence of eſtates becoming hereditary, and, in reſpect of military tenures, a fruit of ſeignory, is *wardſhip*, or guardianſhip. For it muſt now frequently happen, by the death of anceſtors, that eſtates would deſcend to heirs incapable to do the ſervice, to manage their affairs, or to educate themſelves. It was neceſſary, therefore, that the law ſhould make proviſion both for the doing the ſervices, and the benefit of the heir, until he arrived at a proper age. And the law proceeded in a different manner, as the lands were holden either by knights ſervice or ſocage; tenure, in the firſt caſe, having in view principally the defence of the realm; in the ſecond, the benefit of the heir. With reſpect to military tenures, the time of age was twenty-one years compleat; at which time the law preſumed the heir was qualified, both by ſkill and ſtrength of body, to perform the part of a ſoldier. At this age, therefore, he was out of the ward. If his anceſtor died before he had attained that age, his lord had by law the guardianſhip both of his lands and perſon till then, and took the profits of the lands to himſelf for his own uſe, being only obliged to educate and maintain the heir in a condition ſuitable to his rank and ſtation. The reaſon of this was, that it was a principle in the feudal law, as the profits and the military duties were equivalents for each other, that he who was obliged to the duty ſhould enjoy the profits, which, in the firſt inſtance, was the lord, he being obliged to anſwer the king, or other ſuperior lord, for all the military duties compriſed in his ſeignory.

He had the guardianſhip, likewiſe, of the heir's perſon; firſt, that, becauſe of the bond under which he lay to the tenant and his heirs, the law had entire confidence in the care he would take of the minor; ſecondly, becauſe the

lord

lord was certainly well qualified to inſtruct him in the art of war; and thirdly, his own intereſt obliged him to do this carefully that his vaſſal might be enabled to perform to him the future ſervices. But this, as to the perſon, is to be underſtood, if the minor's father was not living. For if he was, he was guardian by nature, and entitled to the cuſtody of the perſon, as in the caſe put by Littleton, where there is a grandfather by the mother's ſide, tenant, by knight ſervice, father, and mother, and ſon; and the mother dies, leaving the grandfather, and then the grandfather dies, and his land deſcends to the ſon of his daughter, then a minor, the minor's father ſtill alive; here the guardianſhip ſhall be divided. The grandfather's lord ſhall have the ward of the lands, and the father ſhall have the ward of the perſon of his minor ſon. So it is if a lord gives land in fee by military ſervice to the ſon of A, by which ſon's dying without iſſue the lands deſcend to his brother, a minor. Here A, the father, ſhall have the cuſtody of the body, and the lord, of the lands. There was another caſe, likewiſe, wherein the guardianſhip, I cannot ſay was divided, but where the wardſhip of the perſon was extinct. Anciently, although twenty-one years was the regular time, yet, if the minor was knighted by the king, and thereby adjudged capable of ſervice in perſon, the guardianſhip ceaſed. For here, the legal preſumption of unfitneſs was refuſed by a poſitive act of the king to the contrary. But the lords obtained an act of parliament, that, notwithſtanding ſuch knighthood in minority by the king, the lords ſhould retain the lands of the minor ſo knighted, till he was twenty-one years of age; and ſo, after this act, the wardſhip of the lands continued, though that of the perſon, who was by the king's act declared *ſui juris*, was gone *.

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* Forteſcue de laud. leg. Angliæ, cap. 44. Glanvil, lib. 2. chap. 9. Spel. reliq. p. 25, 26. Du Cange, voc. Warda.

The term of twenty-one years, which I have mentioned was confined, as may appear by what I ſaid concerning it, to heirs minor, that were males; but with reſpect to heirs female, minors, as almoſt all of our fiefs ſoon after the conqueſt were feminine feuds, as the lawyers on the continent call them, that is, deſcendable to females in the next degree, if males in that degree failed, the limitation of minority was different. In theſe fiefs it was impoſſible the woman herſelf ſhould do perſonal ſervice: She was, therefore, allowed a ſubſtitute; but in time of minority, as ſhe could not appoint a proper one, the lord who was bound to perform the ſervice to his ſuperior, had the lands in the ſame manner as in caſe of an heir male. However, there was no reaſon that the minority of a woman in wardſhip ſhould continue ſo long as that of a man, namely, to twenty-one years; for as the law of God declared that man and wife ſhould be one fleſh; ſo the canon law, and ours in conſequence, have decreed, that, in law, the man and wife are one perſon, and that the huſband in all reſpects is bound to perform the obligations ſhe lies under. Hence, in caſe of a female heir, the term of the lord's guardianſhip was, by the common law, limited to fourteen years; by which time it was preſumed ſhe might have a huſband capable, and obliged to do the duty for her. But this age of fourteen years was, in a particular caſe, extended, by act of parliament, to two years farther. However, as the reaſon of that depends on the lord's right to the marriage of the heireſs, it will be better to defer ſpeaking thereof, until we come to that head.

It remains to be mentioned, what was the nature of this intereſt the lord had in the eſtate of this minor tenant, by virtue of the feudal inſtitutions, and ſo contrary to the general

general and the original tenure of them. For, ſimply, the lord had only the propriety, and in conſequence the right of reverſion or eſcheat, with the render of the ſervices; whilſt the tenant had the poſſeſſion and the profits. But, in this caſe, all theſe ſeem to be blended, particularly the right of original propriety and poſſeſſion, ſo eſſentially to be diſtinguiſhed in the feudal ſyſtem. For the lord has not only his propriety in right of his ſeignory, but alſo the abſolute poſſeſſion, and permanency, or taking of the profits, and the minor heir apparently nothing. However, law in the this caſe, did juſtice, and created in the lord a temporary intereſt, an eſtate for years, namely, for the number of years till the majority was compleated, contrary to all the other feudal maxims. For the fee and inheritance of the eſtate remained in the minor, though he had neither poſſeſſion or profits. This intereſt of the lord could not be called, at leaſt with ſtrict propriety, a tenancy for years, becauſe, in this caſe, the lord poſſeſſes the tenant's lands, not the tenant. The lords had therefore no tenure, but an eſtate for years, created by the law; and that it was originally conſidered as an eſtate for years, or a chattle intereſt in lands, appears from two things. Firſt, that in the early times, when alienations were ſcarce allowed, it was aſſignable over to another, without any licence or form. Secondly, that inſtead of going to the heir, in caſe of the lord's death, during the minority of the ward, it went to the lord's executors, as other eſtates for years did †.

As the lord was bound to his vaſſal and his heirs by the homage done to him, it certainly followed, that it was not lawful

† Craig, de feud. lib. 2. dieg. 20. Wright on tenures, p. 86. et ſeqq. Dalrymple on feud. property, chap. 2. § 2.

lawful for him to do, during the wardſhip, any actual waſte (that is, any permanent damage) to the eſtate of his minor ward, or to ſuffer any to be done by others. He was alſo obliged to repair and keep in condition, out of the profits of the eſtate, the houſes and improvements thereon; yet ſo great was the miſbehaviour of the Engliſh lords, ſoon after the conqueſt, that many ſevere and reſtrictive laws were, from time to time, made in favour of the minor wards ‡.

In my next I ſhall treat of guardians in ſocage, reſerving the article of marriage, though it appertained to military ſervice, to a place by itſelf; as it was of a diſtinct nature, and went on its own particular ground in a great meaſure.

‡ Ruffhead's Statutes, p. 2, 3. Baſnage, Coutume de Normandie, tit. des gardes.

LECTURE XIII.

Wardſhip in Socage—The nature and hiſtory of the incident of marriage.

HAVING, in the laſt lecture, given ſome account of wardſhip and guardianſhip in chivalry, it will be neceſſary to mention what proviſion the law made, now lands were become hereditary, for the benefit of a minor, when lands, held in ſocage, deſcended to him. In the former caſe, where war was the conſideration, whoſe times and exigences were uncertain, the law was obliged, on account of the public ſafety, to conſider the intereſt of the lord, who was to anſwer the duties to the ſtate, in the firſt place, and the intereſt of the minor only in a ſecondary light. But in ſocage lands, which the lord had parted with for certain fixed ſtipulated ſervices, to be paid at particular times, the lord had no claim to any more than them. Neither did the public intereſt demand a military perſon for the guardian of one who was not to be bred a ſoldier. A near relation, therefore, was the propereſt perſon to take the wardſhip.

But in fixing who that perſon ſhould be, the feudal and the Roman civil law proceeded on different principles; the latter fixed upon the neareſt relation that was inheritable to the eſtate, but the former entirely excluded all relations that

that might inherit. Thus, if the land deſcended on the ſide of the father, all relations of the father were incapable, and the mother, or the next of kin of her blood, was the guardian. And this is a difference wherein the Engliſh lawyers greatly triumph over the civilians. For to give the care of a minor to one who might be his heir, is they ſay, *quaſi agnum lupo committere ad devorandum.* But this very reaſon ſtrongly proves the general wickedneſs and barbarity of the people, who were obliged to eſtabliſh this rule at that time. Both laws were equally wiſe, becauſe adapted each to the circumſtances of the nations that made them. The Romans, who were a poliſhed civilized people, among whom murders were infrequent, were not afraid to truſt the perſon of the minor to the care of one who might be his heir; and ſuch an one they preferred on account of the preſervation of the eſtate, which they preſumed would be taken beſt care of by him to whom it might deſcend. The northern nations, on the contrary, who were barbarians, and murderers, were obliged to ſacrifice the conſideration of preſerving the eſtate, to the perſonal ſafety of the infant, and therefore committed both to one who could have no intereſt in the ſucceſſion.

The guardian in ſocage differed from guardian in chivalry in this, that he was but in the nature of a bailiff, or truſtee, for the minor, to whom, at the expiration of his guardianſhip, he was obliged to account, upon an allowance of all his reaſonable coſts and charges. Another difference was, as to the *term* of the guardianſhip. For this guardianſhip expired at the ward's full age of fourteen; at which time, if he pleaſed, he might enter and occupy the lands himſelf, or chooſe another guardian; for as at that age he had diſcretion enough to conſent to marriage, ſo did

did the law ſuppoſe he had ſufficient perhaps to manage his own affairs, at leaſt to chooſe the propereſt perſon for that purpoſe †.

But put the caſe, Suppoſe that the minor doth not enter, or chooſe another guardian, but that the old one continues to receive the profits, what remedy ſhall the minor have for thoſe received after his age of fourteen? Certain it is, he cannot bring an action of account againſt him as guardian; for guardianſhip is expired; and yet the infant's diſcretion cannot be preſumed ſo great, as to be perfectly acquainted with all his legal rights, and therefore his negligence ſhall not be imputed to him. The law in this caſe remedieth him by a reaſonable fiction, and ſuppoſeth, though the fact hath not been ſo, that the minor had appointed him to receive the profits of the eſtate, and therefore gives an action of accounts againſt him, not as guardian, but as bailiff or receiver.

But ſuppoſe the next of kin neglects the guardianſhip, and any other perſon of his own head enters, and takes the profits, what remedy ſhall the minor have? In this caſe the law will not ſuppoſe him that enters to be a wrong doer, an *abator*, as the law would call him, if the heir was of full age; but will rather preſume his act proceeded from humanity and kindneſs, to ſupply the neglect of the proper guardian; and therefore, though he is not appointed guardian, either by the act of law or otherwiſe, he ſhall be conſidered as ſuch, and the heir, after fourteen, ſhall have an action of account againſt him, and charge him as guardian. So ſtrictly was the guardian in ſocage accountable to his ward

† Coke on Littleton, lib. 2. ch. 5. ſect. 123. Houard, anciennes loi ſ des Francois, liv. 2. ch. 5.

ward for the profits, that, if he married him within the age of fourteen, he was not only accountable for the money he received in conſideration thereof (as it was the practice in thoſe days to ſell the marriage of wards) but if he received none, he was accountable out of his own fortune for what he might have received on that account, unleſs the match itſelf was equally, or more beneficial.

The next conſequence of fiefs becoming hereditary, and which followed from the wardſhip, is the *marriage* of the ward by military ſervice, which belonged to his lord, and was one of his beneficial fruits of tenure; and although this part of our law is now antiquated by the aboliſhing of knight-ſervice, it is neceſſary, for the underſtanding our books, to have at leaſt a general notion of it

This right roſe originally, on the continent, from fiefs becoming deſcendible to female heirs, and was grounded upon the ſame principle as the rule which forbad vaſſals to alien without their lord's conſent. As every feudal kingdom, at this time, conſiſted of a number of principalities, under their reſpective lords, who were often at war with each other, the tenant could not alien without his lord, leſt he might introduce an enemy into the feudal ſociety. The like danger was there if a female heireſs was permitted to marry at her own pleaſure, or could be diſpoſed of by her relations without the lord's conſent. And at firſt, it ſeems, that this rule was general to a woman heireſs during her whole life; but if ſo it was, it ſoon abated, and was confined to the marriage of females in wardſhip, and to the firſt marriage only. The law of Normandy ſays, if a woman be in wardſhip, when ſhe ſhall be of an age to marry, ſhe ought to marry by the counſel and licence of her lord,

lord, and by the counſel and aſſent of her relations and friends, according to what the nobleneſs of her lineage and the value of her fief ſhall require.—— So that antiently the lord had not the abſolute diſpoſal of her, nor had he any thing to ſay to the marriage of males; for though he ſhould marry an enemy, the fief was not thereby put into ſubjection to her, but ſhe into the ſubjection of the vaſſal. And this rule, that the lord's conſent ſhould be had, was not intended for him to make an advantage of, but was a mere political inſtitution, for the ſafety of the community. Such was the law introduced into England at the conqueſt. However, it was but natural to expect that avaricious lords would take advantage of their negative voice, to extort money for licence, and by that, and their influence over their vaſſals, to arrogate the ſole power to themſelves. That William Rufus acted thus, we may learn from the remedial laws of his brother and ſucceſſor Henry the Firſt; *Si quis baronum, vel hominum meorum, filiam ſuam nuptum tradere voluerit, ſive ſororem, ſive neptem, ſive cognatam, mecum inde loquatur; ſed neque ego aliquid de ſuo pro hac licentia accipiam, neque ei defendam quin eam det, excepto ſi eam jungere velit inimico meo.* Another is, *Si mortuo barone, vel alio homine meo, filio hæres remanſerit, illam dabo conſilio baronum meorum* †.

Notwithſtanding theſe laws, the miſchief ſtill gained ground, and the lords extended their encroachments, until they not only got the abſolute diſpoſal of female, but of male heirs alſo. When this happened, is hard to determine preciſely. That it was after Glanville, who wrote in Henry the Second's time, and before Bracton, who wrote in Henry the Third's, is plain: Mr. Wright's conjecture

† LL. Henry 1. c. 1. Bracton, lib. 2. c. 37. ſect. 6. Craig, de feud. lib. 2. Diegeſ. 21. Du Cange, voc. Maritagium. Glanvil, liv. 7. c. 12.

jecture ſeems probable, that it grew up in Henry the Third's time, when the barons were very powerful, from a ſtrained conſtruction of Magna Charta, which ſays, *Hæredes maritentur abſque diſparagatione*; where the general word *hæredes* ſhould have been conſtrued to extend only to ſuch heirs as by the former law were marriageable by their lords, namely, female ones; but both king and lords, taking advantage of the generality of the expreſſion, claimed and uſurped that of the ſons alſo ‡.

However, it is rather to be preſumed that this incroachment began earlier; ſince in the ſtatute of Merton, the twentieth of Henry the Third, we find theſe words: *Quia maritagium ejus qui infra ætatem eſt* (ſpeaking of a male) *mero jure pertinet ad dominum feudi.* From whence I rather gather the practice was earlier than Magna Charta, which was not above thirty years before, and confirmed by its interpretation. But if, in this reſpect, the vaſſals were encroached on by their lords, in another, they met with a mitigation in their favour. For the conſent during the father's life, went into diſuſe, and every man was allowed to marry his ſon or daughter at his pleaſure; and this with very good reaſon. For as the prohibition was for fear of introducing an enemy, of this there was no danger where the marriage was by the father, a vaſſal, bound by homage and fealty to do nothing to the prejudice of his lord. Thus was right of conſent to marriage, introduced firſt for political reaſons, turned into a beneficial perquiſite, and fruit of tenure, for the advantage of the lord; and notwithſtanding all the laws made to regulate it, as conſtantly abuſed; ſo that the evils thence ariſing were not among the leaſt cauſes for aboliſhing military tenures †.

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‡ Wright on tenures, p. 97.
† Ruffhead's Statutes, fol. p. 19.

The penalty for marrying without conſent was originally, as all breaches of fealty were, abſolute forfeiture. But the rigour of the feudal law ſubſiding, lighter penalties were introduced. By the ſixth chapter of Merton remedy is given to the lord, whoſe ward, under fourteen, has been taken away by any layman (and a later act extends it to the clergy) and married, by an action againſt the *raptor* or *raviſher*, as he is called, for the value of the marriage, beſides impriſonment and a fine to the king. If the ward himſelf, after the age of conſent, or fourteen, ſhould, to defraud his lord, marry himſelf, he, as guilty of a breach of fealty, is more grievouſly puniſhed than a ſtranger. For this act provides, that the lord, in that caſe, ſhall retain the lands after the full age of twenty-one, for ſo long a time as, out of the profits, he might receive double the value of the marriage ‡.

The next, the ſeventh chapter, is in favour of the ward, and an enforcement of that chapter of Magna Charta which forbids diſparagements without inflicting any penalty. It enacts, that if the minor under fourteen is married by his Lord to his diſparagement, upon the plaint of his relations, the lord ſhall loſe the wardſhip; and the profits of the lands, till full age, ſhall be received by the relations ſo complaining, and laid out for the benefit of the heir. But if the marriage was after fourteen, the age of conſent, it was no forfeiture, on the maxim, *Volenti non fit injuria*. This act goes farther in favour of the minor; for it gives him a liberty of refuſing any match the lord ſhould offer him. But to prevent the lord's entirely loſing the benefit of the marriage by the refractorineſs of the ward,

‡ Ibid. p. 6.

it enacts, in this caſe, that if he refuſes a convenable marriage, the lord ſhall hold the lands after twenty-one to his own uſe, until ſuch time as his late ward ſhall pay him the ſingle value thereof.

The twenty-ſecond chapter of Weſtminſter the firſt confirms and repeats the ſixth of Merton, and farther obviates a fraudulent practice of the guardians of female heirs. I obſerved that their wardſhip by law ceaſed at the age of fourteen, by which time they might have huſbands capable of the ſervice: but ſome lords, *for covetouſneſs of the lands*, as the act expreſſes it, would not offer any match at all to their female wards, under the pretence of their being incapable of the ſervices, in order to hold on the lands for an unlimited time. This act ſo far alters the old law, that if the heireſs arrives unmarried at the age of fourteen, the lord ſhould hold two years longer, that he may have time to look out for a proper match to tender her, within which time, if he neglects it, he loſes all right to her marriage. On the other hand, if the heireſs will refuſe a ſuitable offer, the lord is impowered to retain the lands until twenty-one, and ſo much longer, until he has received out of the profits ſatisfaction for the value.

The raviſhment of wards from their lords continuing, notwithſtanding the ſtatute of Merton, the thirty-fifth of Weſtminſter the ſecond gave the writ called *Of raviſhment of ward*, and aſſigned a more ſpeedy and beneficial method of proceeding, and added to the puniſhments by the former act of Merton inflicted on offenders †.

But

† Coke's inſtitutes, part 2. p. 440. Ruffhead, vol. I.

But notwithſtanding all theſe regulations concerning marriages, and the other many acts made to prevent miſbehaviour of lords to the lands of their wards, the ſource of the evil remained in the wardſhip itſelf; and the evils conſtantly followed, inſomuch that for hundreds of years, it was one of the heavieſt grievances the ſubject ſuffered. Many were the waſtes done to eſtates; many the heirs married contrary to their inclinations, and frequently unſuitably. The grievances fell heavieſt on the wards of the crown. There were always a ſet of needy or greedy courtiers ready, if they had favour enough to beg, or otherwiſe to buy at an under rate, the wardſhips of minor tenants, of which they were ſure to make the moſt advantage; marrying the moſt opulent heirs to their own children, or relations, or extorting extravagant ſums for their conſent. A remarkable inſtance of this happened ſo lately as Charles the Firſt's time, in the caſe of the earl, afterwards firſt duke of Ormond. A long ſuit had ſubſiſted between the lady Preſton, grand-daughter and heireſs at law of Thomas earl of Ormond, and her couſin, the heir male of the family, for that part of the eſtate her grandfather had entailed to go with the title. At length the relations on both ſides thought the beſt expedient to end this intricate diſpute, was by uniting the young relations, who likewiſe had conceived a ſtrong affection for each other; yet, although the king approved highly thereof, did the earl of Warwick, who was grantee of the young lady's wardſhip, extort ten thouſand pounds before he would conſent to a marriage on every account ſo deſirable.

King Henry the Eighth, finding how grievouſly the ſubject was oppreſſed, and how much the crown was defrauded, erected, by act of parliament, a court called the *Court of Wards*, to take proper care of minors, and to anſwer

ſwer in a moderate manner for the profits to the king. This for ſome time was a conſiderable alleviation of the load; but in the weak reign of James the Firſt, who was governed by his favourites Somerſet and Buckingham, this court was converted into an engine for raiſing their families, by providing their numerous and indigent relations with the greateſt heireſſes, to the great diſcontent of the antient nobility, who ſaw the moſt opulent fortunes ſuddenly raiſed by private gentlemen, dignified by titles for the purpoſe. And great were the extortions likewiſe for the licenſes that were granted to ſome to marry at their pleaſure. The only advantage the public reaped at this time from this right of diſpoſal in marriage was, and it muſt be allowed to be a conſiderable one, the opportunity it gave the crown of breeding the heirs of many families in the reformed religion; and in juſtice, it muſt be owned, this was not neglected.

In the eighteenth year of this laſt reign, it was moved in parliament to purchaſe off theſe heavy burthens of ward and marriage, by ſettling an handſome yearly revenue in lieu thereof on the crown. But the attempt did not ſucceed at that time, probably owing to the courtiers oppoſition to it, from their own intereſted views. In Charles the Firſt's reign, this court was one of the great objects of complaint. At length, on the reſtoration, the king conſented to turn all the military tenures, except grand ſerjeanty, into ſocage, in conſideration of an hereditary revenue ſettled on him, and ſo all the fruits thereof ceaſed, and the feudal ſyſtem, which had for ages, from time to time, undermined the conſtitution, fell to the ground, though very many of the rules of our law, founded on its principles, ſtill retain their force ‡. In this kingdom the equi-

‡ 32 Henry VIII. c. 46. 12 Car. II.

equivalent given for this abolition was the tax of hearth-money, in which, it muſt be owned, the king, and thoſe who had been his military tenants, were a little too ſharp for the reſt of the people; for by the improvements of the kingdom, that revenue is every day increaſing to the crown, and almoſt the whole burthen is thrown on the lower claſs, who before felt none of the oppreſſion, or weight of ward-ſhip and marriage.

LECTURE XIV.

The rules of deſcent in the old feudal law in regard to the ſons of the late poſſeſſor—Repreſentation and collateral ſucceſſion—Feminine Feuds.

IT is now time to ſee how inheritances deſcended by the feudal law, where, in the original grant, there were no particular directions to guide the deſcent; for in ſuch caſe the maxim of the feudal law holds, *Tenor inveſtituræ eſt inſpiciendus;* or, as the common law expreſſes it, *Conventio vincit legem.* The firſt rule then was, that deſcendants of the firſt acquirer, and none others, were admitted. The reaſon was, that his perſonal ability to do the duties of the fief was the motive of the grant, together with the obligation his fealty laid him under to educate his offspring to the lord's obedience, and to qualify him for his ſervice in war. It was obſerved, therefore, it ſhould go to the firſt purchaſer's collateral relations, whom he had no power to bind by his acts, and over whoſe education he had no influence. I mean where it was not particularly otherwiſe expreſſed; for then the collaterals ſucceeded, as the merit of their blood was part of the conſideration; not ſo properly in the right of heirs, as by way of remainder, under the lord's original grant †.

The

† Craig, de feud. lib. 2. Dieges. 13. Dalrymple on feudal property, ch. 5. ſect. 1.

The next thing to be enquired is, ſince the deſcendants alone inherited, whether all, or which only of them inherited. And here the females and their deſcendants, unleſs they were ſpecially named, were totally excluded, not merely for their perſonal incapacity, but leſt they ſhould carry the fief to ſtrangers, or enemies; and therefore, where they were admitted, they were obliged to marry with the conſent of the lord. The third rule is, that, unleſs it was otherwiſe ſtipulated, all the ſons ſucceeded equally to the father. This was the antient feudal law, and the law of England in the Saxon times, the relicks of which remain in the gavel kind of Kent, and remained in the laſt century in many, if they do not ſtill in ſome of the principalities of the empire. In France, during the firſt, and a good part of the ſecond race, we ſee the kingdom divided among the ſons. There are not wanting inſtances of the ſame among the Engliſh Saxons; and the Spaniards continued the practice now and then even in later ages. But the frequent wars, occaſioned by theſe partitions, at length aboliſhed them, and made kingdoms to be conſidered as indiviſible inheritances. In imitation of the ſovereignty, the ſame alteration was introduced into the great ſeignories, which made, at this time, the principal ſtrength of the kingdom, and which, now the crown was become indiviſible, would, if liable to partition, become ſo inconſiderable in power, as to be at the mercy of the king †.

The inconveniencies attending the lower military tenancies which ſtill continuing diviſible, were crumbled into very ſmall portions, and, of courſe, muſt have fallen into indigent hands, were ſuch, that theſe alſo, for the moſt part, became deſcendible to a ſole heir. But this, however, was

† Craig de feud. lib. 2. diegeſ. 14.

was not effected but by degrees; for in the reign of Henry the First, though a ſingle knight's fee was not diviſible, yet when a man died ſeized of more than one, they were diſtributed among his ſons as far as they went; but in his grandſon's reign the general law was ſettled in favour of a ſingle heir, in the ſame manner as it has ſtood ever ſince ‡.

But it remains to be enquired which of the ſons, in caſe of an indiviſible inheritance, ſhould be this ſole heir. In the antient and unſettled times, the law made no particular proviſion; but, as the lord was the head of the military ſociety, and bound to protect it, it was left to his option to fix upon the propereſt perſon to do the duties: and an inſtance of the exertion of this power we have in England ſo late as the reign of Henry the Second, who gave the entire military lands of Geoffry de Mandeville to his ſon by a ſecond ventre, to the excluſion of the eldeſt by a former wife, for this reaſon, *eo quod melior eſſet miles*. A trace of this ſtill remains in the caſe of a peerage, deſcendible to heirs general, that is, male or female, falling to daughters. Here the fief being indiviſible, the king may appoint the peerage to which he pleaſes, and until he doth ſo, it is not indeed extinguiſhed, but lieth dormant, being what is called *in abeyance*, or the cuſtody of the law. But at length this uncertainty was removed, and the eldeſt ſon being generally the beſt qualified, and conſequently almoſt always choſen, obtained the right, by degrees, in excluſion of his brethren, or the choice of the lord †.

But

‡ Baſnage, coutume de Normandie, tit. Du partage d'heritage. LL. Hen. 1. 70.

† Dalrymple on feud. property, chap. 5. § 1. Hume, appen. 2.

But it will be inquired with reſpect to kingdoms, who had no ſuperior to make the choice, how was it to be determined after they became indiviſible, which of the ſons was to ſucceed, ſeeing the abſolute right of primogeniture was not yet eſtabliſhed in the opinions of men. In anſwer, the uſual practice was for the king himſelf, before his death, to appoint the ſucceſſor; generally with the conſent and approbation of his ſtates, and ſometimes merely by his own act, which was almoſt univerſally allowed, and obeyed by the people. But if no ſuch diſpoſition had been made, the ſtates aſſembled, and choſe the perſon themſelves; and theſe appointments generally falling on the eldeſt ſon, paved the way for lineal hereditary ſucceſſion, though the caſe was not always ſo.

In France, Hugh Capet, to go no higher, in order to prevent competition, cauſed his ſon Robert to be crowned, and ſworn allegiance to in his lifetime; but Robert neglecting the ſame precaution, Henry his younger ſon was choſen in preference of the elder, who was obliged to content himſelf with the dutchy of Burgundy. And if Henry was an uſurper, ſo were all the ſucceeding kings of France for three hundred years, till that family of Burgundy failed. Henry followed his grandfather Capet's example, and ſo did his ſucceſſors for about an hundred years, and then, the notion of the lineal ſucceſſion of the eldeſt ſon being fully eſtabliſhed, the cuſtom of crowning the ſon in the father's life, was laid aſide, as unneceſſary.

In England the practice was antiently the ſame. William the Conqueror, though he ſet up a claim under Edward the Confeſſor's will, yet as that never appeared, a formal election by which he was choſen, extorted indeed by dread of his power, but apparently free, was his title.

When

When preſſed to declare a ſucceſſor, he only ſignified his wiſh that William might ſucceed, but declared he would leave the people of England as free as he had found them. William accordingly was elected in prejudice of his elder brother Robert, and upon his death, occaſioned by an accident, Robert was again excluded, and Henry the Firſt, the third brother, choſen. Henry was willing to have the courſe of deſcent ſecured in his offspring; and for this purpoſe proceeded in the method that had been ſo ſucceſsful in France, namely, by cauſing his ſon Henry to be crowned, and ſworn to. But this latter dying childleſs in the lifetime of his father, king Henry cauſed his daughter Maud to be acknowledged ſucceſſor, and the oath of eventual allegiance to her to be taken by his people. However, this project did not ſucceed. No nation of Europe had yet ſeen a crown on the head of a female; and Spain was the only country that had ever had a king who claimed in a female right. The majority, therefore, upon Henry's death, looked upon their oath as inconſiſtent with the nature of monarchy, and void, and in conſequence choſe Stephen, who was the ſon of Maud's aunt, and grandſon of the Conqueror, whoſe whole male iſſue was now ſpent. There was, however, a large party in the kingdom who paid a greater veneration to the obligation of their oath, and adhered to Maud. Hence was this reign a continued ſcene of civil war, until all ſides, being wearied out, by mutual conſent, ratified by the ſtates of the kingdom, Stephen was allowed king for life, and Maud's perſonal pretenſions, as a woman, being ſet aſide, her ſon, Henry the Second, was declared, and ſworn to, as eventual ſucceſſor †.

Henry

† Hale's hiſt. of the common law, chap. 5. Bacon's hiſt. and polit. diſcourſe on the laws and government of England, part 1. chap. 45, 55, and 56.

Henry the Second followed the example of his grandfather, and had his eldeſt ſon Henry crowned; but that ungrateful prince conſpiring and rebelling againſt him at his death, which likewiſe happened in the lifetime of his father, the old king fearing the like conſequences, refuſed to crown his next ſon Richard; who conſcious of his own ungrateful conduct, and ſuſpecting that this refuſal proceeded from partiality to John, the youngeſt and favourite ſon, ſtirred up thoſe commotions and rebellions which broke his father's heart. Richard was the next heir, and did ſucceed, but not merely in the right of next heir; for he aſſumed no title but that of duke of Normandy, until he was elected and crowned. The title of John was notoriouſly by election, and his ſon Henry the Third was the firſt who was introduced to his ſubjects by the words, *Behold your king*, or words equivalent. Thoſe few who adhered to his father, immediately ſwore to him; but the majority, who were diſaffected, did not ſubmit but upon terms, the reſtoration of the charters.

From that day the lineal ſucceſſion has been eſtabliſhed, and the crown is veſted in the ſucceſſor upon the death of his anceſtor, and the maxim prevailed of the king's never dying; whereas before, the crown was in abeyance, till coronation, and the date of the king's reign was taken, not as now, from the death of the former monarch, but from the day that the ſucceeding one was crowned. Henceforth coronation became a mere ceremony, though the form of an election is ſtill continued in it. I have been more particular in this detail, in tracing the origin of the hereditary deſcent of the crown, to ſhew how falſe in fact, as well as in reaſon, the notion is of its being founded either on di-

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vine right, or on any law of man coeval with the monarchy †.

Having laid down the rules of deſcent in the old feudal law, in regard to the ſons of the laſt poſſeſſor, it will be proper next to mention how far it admitted repreſentation, or collateral ſucceſſion; for at firſt both were excluded. If a man had two ſons, one of which died before him, leaving a ſon, the grandſon could not ſucceed to his grandfather, but the uncle was ſole heir. This was grounded partly on the preſumption that the uncle was of more mature age, and better qualified to do the ſervice; but this could not be the only reaſon, for the rule was general, and held where the grandſon was of full age and capacity. We muſt have recourſe, therefore, to a farther cauſe, which was alſo the ſame that, in thoſe old times, prevented collateral deſcents; for if a man had two ſons, by the old law, the eſtate was divided between them. If one of theſe died without iſſue the brother did not ſucceed to the ſhare of the deceaſed, but it reverted, as an eſcheat, to the lord. The reaſon of both theſe was, that he that claims by deſcent, muſt claim through the laſt poſſeſſor, and derive his right from him; and that right aroſe from the ſuppoſition of his being educated in the fealty of the lord, that is, by the laſt poſſeſſor who had ſworn fealty. Therefore the grandſon, being educated under the *patria poteſtas* of his father, who, dying before the grandfather, had never taken the oath of fealty, was excluded the ſucceſſion, as not trained up by a real tenant; but the uncle was admitted to claim from the grandfather, the tenant under whom he was bred ‡.

This

† Id. chap. 57. See alſo Tyrrel's hiſtory, and Kennet's hiſtorians.

‡ Glanvil, lib. 7. cap. 3. Craig de feud. lib. 2. diegeſ. 15. Dalrymple on feudal property, chap. 5. § 2.

This rule was of ſome advantage to the feudal ſyſtem at that time, as it frequently prevented the too great crumbling of fiefs, when almoſt all of them were diviſible. For the ſame reaſon a brother could not ſucceed to a brother, even in a paternal fief, becauſe he was not educated by the laſt poſſeſſor that had done fealty: and though this ſeems very unreaſonable, as he had been bred in the fealty of the lord, namely by the father, yet this rule continued for ages, being greatly for the advantage of the king and the great lords, in regard to their eſcheats; as every failure of a lineal deſcent occaſioned them to happen. Neither was it thought ſevere in thoſe early ages by the tenants. As all benefices were originally for life, it was a great advantage to have them made deſcendible even under theſe ſtrict limitations †.

At length the neceſſity of Charlemagne's grandſons, who had parted the empire, and were in eternal broils, extorted from them, in France, a grant of the grandſon's ſucceeding in his father's ſhare, by way of repreſentation, in imitation of the civil law, and alſo of brothers ſucceeding to brothers in a paternal fief, but not in a new one. And in about an hundred and fifty years the like neceſſity of the emperor Conrad, who was embroiled with the Pope, procured the ſame law for Germany and Italy ‡.

The extenſion of the right of collateral ſucceſſion beyond brothers grew up by degrees, not from any poſitive law. It was firſt extended to uncles and couſin-germans, provided it was a fief deſcended from the grandfather; afterwards to any the next couſin, to the ſeventh degree, deſcended

† Lib. Feud. 2. tit. 12.

‡ Lindenbrogius, cod. leg. antiq. p. 679.

ſcended from the firſt purchaſer; and at laſt to any, however remote, who could prove their deſcent from the firſt purchaſer. This was the rule in ancient inheritances; but with reſpect to new ones, lately acquired, there grew up a practice of granting them *as ancient* ones; *feudum novum, ut antiquum, datum.* Here the fief, though really new, was, by means of this grant, ſuppoſed to proceed from ſome indefinitely remote anceſtor, at any diſtance; and therefore any one, who could prove himſelf deſcended from a common anceſtor of the laſt poſſeſſor, was admiſſible, and he that was neareſt by the rules of ſucceſſion was preferred. In this caſe, therefore, the old rule of requiring a proof, that the perſon claiming as heir was a deſcendant of the body of any anceſtor of the laſt poſſeſſor, would be abſurd, as defeating the tenure of inveſtiture. Any anceſtor *pro re nata* might be ſuppoſed the firſt purchaſer, to ſupport the intention of the donor, in his directing it to be conſidered as an ancient fief, although in fact modern. So in this caſe, if the fief was maſculine, any male relation, deſcended from male blood entirely, was inheritable, even up to Adam, I mean, if he could prove his deſcent; but females, and their deſcendants were excluded *.

If it was deſcendible to females, either by the particular terms of the grant, or by the general law of the country, then, as it was ſuppoſed to deſcend from any lineal anceſtor *pro re nata*, that anceſtor might be a female, and the deſcendants of females, and they themſelves might be admiſſible. The rule then was, to eſtabliſh in this caſe of a fictitious deſcent, the ſame regulations as in the caſe of a real one. But here the root from whence the right of deſcent was to ſpring, was inverted; for as there was no real anceſtor,

* Dalrymple on feud. property, chap. 9.

anceſtor, an original purchaſer, the perſon laſt ſeized, that is poſſeſſed of the fee, was the perſon to be conſidered. As in the old and common caſe of inheritances deſcending, the reckoning was downwards from the firſt acquirer; in caſe of collaterals, when they were admitted, you begin to reckon lineally upwards, and at every ſtep enquire for collaterals deſcended from that lineal anceſtor you are upon at the time *.

A man purchaſes *feudum novum, ut antiquum*, and dies without heirs of his body. This feud is, by the conſtitution of it, preſumed to have deſcended from ſome of his anceſtors. To find out who is that anceſtor, it was likely to have deſcended from, you muſt look at the law of deſcents: the father, in the firſt place, is ſuppoſed the perſon. His children, that is, the brothers or ſiſters, or their deſcendants, in the firſt place; if none of them, the grandfather by the father is ſuppoſed the perſon; then the grandfather's deſcendants. The uncles and aunts by the father, and their deſcendants, ſucceed in the ſecond place. If none of them, then the great grandfather's by the grandfather and father deſcendants, the great uncles and aunts, and their poſterity; and if there are none of them, you ſtill go a ſtep higher in the male line, till you can trace it no farther. But now you begin to invert the rule of tracing up in the male anceſtors, and ſo downwards, and trace up to the female anceſtor of the males, as ſuppoſing the eſtate deſcended from her, or her anceſtors. For inſtance, I have ſuppoſed the deſcendants of the male line have failed in the great grandfather. His wife, therefore, the great grandmother, is ſuppoſed the firſt purchaſer; for, upon account of the probability of the inheritance coming through males, I trace up to her through the father and grandfather; her heirs, therefore, ſhall ſucceed, firſt, lineal, then collateral,

* Craig. de feud. lib. 2. dieges. 14.

in the ſame manner as if the eſtate had deſcended from a remote anceſtor of her's. If none ſuch can be found, we deſcend another ſtep, namely, to the grandmother by the father, and ſuppoſe the eſtate to have come from her line; and then heirs, firſt lineal, then collateral, ſucceed according to their ſeveral ranks. If none of theſe, ſo that there is no kindred on the ſide of the father, the preſumption is, that this ſuppoſed antient feud came from the mother's family, and therefore the heirs of her male anceſtors are to be traced up, and diſcovered in the ſame manner; and whenever they fail, the heir of the moſt remote female anceſtor, all through males; and failing them, the heir of the next moſt remote, and ſo on, until the blood of the mother is ſpent; and then the eſtate, for want of heirs, reverts to the lord, of whom it is holden.

Such is the rule of deſcents of new purchaſes granted as if they had been ancient inheritances; but this rule was, on the Continent, and anciently in England, confined to ſuch grants, and them only, wherein this clauſe appeared in the inveſtiture. But in the reign of Stephen, his neceſſity of gaining adherents, and the ſame neceſſity of his competitor Henry the Second, occaſioned ſo many grants of this kind to be made, ſome originally, and others on the ſurrender of old ones, that it hath ſince become the common law of England, that purchaſes, that is, new acquiſitions, are deſcendible to any relation, however remote †.

It will be neceſſary to ſay ſomething as to *feminine feuds*, which are a deviation from the ſtrict principles of the antient law, which excluded them and their deſcendants entirely.

† Hale, hiſt. com. law, chap. 9.

tirely. They firſt aroſe from the woman's being the principal conſideration of the grant; as when a lord gave lands in marriage with his daughter, ſiſter, niece, kinſwoman, or any other female: here the lands being partly given in conſideration of the female blood, it was reaſonable they and their deſcendants ſhould be inheritable. But this was ſtill an exception to the general law, and confined to thoſe grants wherein it was mentioned, until the number of thoſe grants, at length prevailed to have this order of ſucceſſion conſidered as the general law, and the ſucceſſion of males remote, in excluſion of a nearer female (as in caſe of tail male) conſidered as an exception. The monarchy of France, however, and of many of the principalities of Germany, have retained the antient feudal law, in abſolutely excluding females and their deſcendants.

The deſcent of imperial crowns to females, was of a much later date, than that of lower fiefs: for here a manly capacity was looked upon as indiſpenſibly requiſite. The firſt ſtep was admitting a male repreſentative for them, a huſband or a ſon. This began in Spain. Pelagius, who was of the blood royal, having gathered a few of the Spaniſh fugitives together, after the Mooriſh conqueſt, founded a petty monarchy in the mountains of Aſturias. His ſon Favila dying without iſſue, the crown was given to his daughter's huſband, and this continued the rule for many ages, where males failed. But where the ſon of ſuch female heir was of ſufficient age to mount the throne, he of courſe excluded both mother and father. At length, in the thirteenth century, Europe, for the firſt time, ſaw a woman ſolely inveſted with royalty, Joan the firſt of Naples; for Henry the firſt of England's project in favour of his daughter Maud, as we have ſaid before, had miſcarried.

Margaret of Denmark, Sweden and Norway, Joan the ſecond of Sicily, and Iſabella of Caſtile, followed in the next century. In the following century came Mary and Elizabeth in England, and many ſince in all parts of Europe; ſo that at preſent the monarchies of Europe are deſcendible to females in general, if we except France, and ſeveral but not all of the principalities of the empire. Bohemia and Hungary have received a queen in the perſon of the preſent empreſs in this preſent century, but ſo inveterate are old cuſtoms and opinions, that when her faithful Hungarians reſolved to aſſiſt her to the laſt extremity, it was by ſaying, *moriamur pro rege noſtro Maria Tereſa*, not *pro regina* †.

† Giannone's hiſt. of Naples. Selden's tit. hon, part 2. chap. 2.

LECTURE XV.

The difference between allodial and feudal lands—The reſtrictions on the feudal law—The decay of theſe—The hiſtory of voluntary alienations.

ONE great and ſtriking difference between allodial and feudal lands conſiſted in this, that the former entered into commerce. They were ſaleable or otherwiſe alienable, at the will of the poſſeſſor, either by act executed, and taking effect in his lifetime, or by will, to take effect after his death. They were likewiſe pledges to the king for the good behaviour of the owner, and therefore for his crimes forfeitable againſt him and his heirs. They were alſo ſecurity to his fellow ſubjects for the debts he might contract; and, therefore, by following the due courſe of law, attachable and ſaleable, to ſatisfy the demands of a juſt creditor †.

In every one of theſe reſpects did fiefs, when they became deſcendible inheritances, differ from them. The poſſeſſed or

† Bouquet, le droit public de France, p. 30.—36.—Allodium, proprietas quæ a nullo recognoſcitur. Tenere in allodium, id eſt, in plenam et abſolutam proprietatem. Habet integrum ac directum dominium quale à principio de jure gentium fuit diſtributum et diſtinctum. Du Moulin, de l'ancienne coûtume de Paris, art. 56.

poſſeſſor was but an uſufructuary, and his power over his lands was checked and controlled by the intereſt others had therein. Theſe were the lord and the perſons deſcended from the firſt purchaſer. The conſent of the lord was abſolutely neceſſary to the tenant's alienation, to prevent the introduction of an enemy or unqualified perſon into the fief; but the conſent of the lord alone was not ſufficient, if there were in being any perſons entitled to the ſucceſſion. Thus if A. is himſelf the firſt purchaſer of a fee, and hath a ſon, his alienation, even with the conſent of the lord, would hold good only during his own life; but if he had aliened with the conſent of the lord before iſſue had, this ſhould be valid, and bind the iſſue born afterwards. For here the alienation was made by all the perſons in being intereſted in the land, and the former contract is by their mutual act diſſolved, nor is there any wrong done; for it is an abſurdity to ſay that a perſon not *in rerum natura* can ſuffer wrong: the conſent therefore of the ſon, or ſons, if one or more of them were in being, was as neceſſary as the lord's in this caſe.

If the lands deſcended from B. the firſt purchaſer, to his ſon A. before the introduction of collateral deſcent, the law was the ſame; but when theſe were admitted, it varied for the ſame reaſon. A. could not alienate with the conſent of the lord and his ſons, without the conſent alſo of all the collaterals intitled, that is, all the *agnati*, or male deſcendants of B. for this would ſtrip them of their right of ſucceſſion. If it deſcended from C. the grandfather, or from any more remote anceſtor, the conſent alſo of all the male deſcendants of the grandfather, or that remote anceſtor was required, upon the ſame principle. By this we ſee, it

was

was next to an impoſſibility, that an eſtate which had been any time in a family (ſo many conſents were required) could be alienated at all. However, there was allowed by that law a transfer of the fief in a particular caſe, even without the conſent of the lord. This was called *refuting the fief*; it was a reſignation of it to the perſon who was next in order of ſucceſſion. Here was no injury done to the lord, or the *agnati*, becauſe it went in the ſame manner, and to the ſame perſons, as if the refuter was abſolutely dead, *& quiſque juri ſuo renunciare poteſt*. For the ſame reaſons no teſtaments of lands were allowed, except the lord, and all others concerned were preſent and conſenting; which ſcarce ever happening, it became a maxim of the Engliſh law, that lands were not deviſable by will.

Neither were the feudal lands originally forfeitable for the crimes of the poſſeſſor for any longer time than his own life, if there were perſons entitled to the ſucceſſion. But this rule of forfeiture was afterwards extended to the iſſue of the criminal: for as the right of ſucceſſion depended much on the ſuppoſition the ſucceſſor was educated in the fealty of the lord, this preſumption ceaſed where the father had actually broke his oath of fealty. And at length, when the rule was eſtabliſhed, that every perſon muſt claim through him that was laſt ſeized, and make himſelf heir to him, the delinquency of the predeceſſor became likewiſe a bar to collaterals.

Feudal eſtates alſo were not liable to the debts contracted by the feudatory. For if the creditor might have ſold them

them for debt, a wide door for alienation had been opened, by means of fictitious debts, contracted by colluſion between the creditor and vaſſal. Or even if they were honeſt ones, the lords and the heirs would have been deprived of their right. Neither could the creditor attach the profits of the land during the life of the debtor; for if he could, an improvident vaſſal might ſo impoveriſh himſelf, as to be incapable of the duties of the fief.

Such and ſo ſtrong were the reſtrictions this old law laid on the feudatory. But as times grew more ſettled, and the ſtrictneſs of the military ſyſtem abated; as commerce increaſed, and with it luxury, the propenſity to alienation grew up, and became at length ſo ſtrong, in every country, as be irreſiſtable. And it is a ſpeculation not only curious, but very uſeful for the ſtudents of our law, to obſerve and remark its progreſs in England *.

The firſt ſtep towards voluntary alienations aroſe from the practice of ſubinfeoffing. Originally, as I obſerved in a former lecture, although the vaſſals of the king could infeoff, their vaſſals could not; but at the latter end of the ſecond race in France, when the power of the crown was declined, and the great lords were in reality ſovereigns, acknowledging only a nominal dependance on the king, ſome of them, in order to ſtrengthen themſelves, and to increaſe the number of their military followers, allowed this privilege not only to their immediate vaſſals, but to ſub-vaſſals alſo, to an unlimited degree. And when this practice was once

* Dalrymple on feud. property, ch. 3. ſect. 1.

once begun, the other lords, for their own ſecurity and grandeur, were obliged to follow the example. This practice of ſubinfeuding contributed much to the power of the lords, and therefore was by them encouraged. But though it was intended, at firſt, only to extend to part of the vaſſal's fief, the uſage of ſubinfeuding the whole gained ground, to the great prejudice of the heirs; when the terms of ſubinfeudation were no better than thoſe of the firſt grants; and of the lords alſo, who thereby loſt frequently their profitable fruits of tenure, their reliefs, wardſhips, and marriages; which, with reſpect to the lords, was remedied in the reign of Edward the Firſt, by the ſtatute of *Quia emptores terrarum* before mentioned †.

In the mean time, free alienation was allowed in cities and boroughs; partly becauſe many of theſe were old Roman towns, and their lands and houſes allodial, and becauſe thoſe which were not ſo were founded by lords on the ſame principles for the benefit of commerce, which could never have flouriſhed if a debtor had not full power over his property of all kinds to ſatisfy his creditor; and if the creditor, in caſe he was unwilling, had not power to compel him to ſell for his juſt ſatisfaction. Alienations, however, of one kind were permitted, namely, the founding of monaſteries, and endowing of churches. Theſe, through the ſuperſtition of the times, were looked upon as being equally beneficial to the feudal ſociety as ſubinfeudation, by engaging God in their intereſt; and even if the lords and their heirs, who ſuffered by theſe grants, were willing to diſpute them, they were unable to contend with the omnipotent

† Lib. 4. feud. tit. 34. Ruffhead's ſtatutes, v. 1. p. 122.

potent power of the pope and the clergy; until at length the tyranny of the firſt, and the avarice of the laſt, provoked both king and people to reſtrain them by the acts againſt Mortmain. But no other alienations were yet allowed without conſent, as before mentioned†.

In the reign of William Rufus a particular matter occurred, which opened a way for alienation without the lords conſent, and occaſioned a prodigious revolution in the landed property of Europe. This was the madneſs of engaging in cruſades for the recovery of the Holy Land. A crazy friar returning from a pilgrimage to Paleſtine, where he ſaw the Chriſtians maltreated, began to preach up this expedition as the moſt meritorious of works; and it is wonderful with what an epidemical contagion the enthuſiaſm ſpread through all ranks of people. Theſe pilgrims, who aſſumed the croſs, had no way of defraying the expence, but by the ſale of their lands, which their lords, if diſinclined, dared not to gainſay, or obſtruct ſo pious a work. But indeed, moſt of them were conſcientiouſly affected with the ſame madneſs, as may be ſeen by the great number of kings, princes, and lords, that beggared themſelves in theſe fruitleſs enterprizes‡.

The pope and the kings concurred in inflaming this ſuperſtition, but from different motives. The pope did it out of ambition and avarice. The former he ſatisfied by declaring himſelf the head of the expedition, and thereby attaching to himſelf and his ſee ſuch multitudes of redoubted warriors by the ſtrongeſt of bonds, conſcientious ſuperſtition.

† Gibſon, cod. jur. eccleſ. Anglican. tit. 28.

‡ Kennet's collection of hiſtorians, vol. 1. p. 116. Carte, hiſt. of England, vol. 1. p. 469. 555.

ſtition. And indeed ſucceſſors in that chair afterwards made very good uſe of this example, by preaching up cruſades againſt ſuch Chriſtian kings and princes as diſobliged them. But the more immediate advantage he received, was the glutting his avarice by a proper ſale of diſpenſations to ſuch as had raſhly taken the croſs, and afterwards found themſelves unable, or unwilling to fulfil the obligation. The reaſon that induced the kings of Europe to promote this ſpirit, I mean ſuch of them as were not poſſeſſed with the frenzy themſelves, was the hope of abaſing their too great and powerful vaſſals, which would naturally follow from the alienation of part of their lands, to equip them for the expedition; and a deſire to facilitate the partition of theſe great ſeignories among females, when the males ſo were frequently and miſerably ſlaughtered †.

So many were the alienations of this kind, and ſo long were they continued, that it is no wonder that the intereſt of the lord and the heirs began to loſe ground in the opinions of the people, which proceeded ſo far, as that, in the other caſes, the lord, on the payment of a moderate fine, either before or after, was looked upon as obliged to conſent to the alienation. Let us now ſee how the liberty of alienation gained ground, particularly in England.

In Henry the Firſt's time, a man was allowed to alienate his purchaſe, but not an eſtate that came by deſcent. This law ſays, *Acquiſitiones ſuas det cui magis velit; ſi Bocland autem habeat, quam ei parentes ſui dederint, non mittat eam extra cognationem ſuam* ‡.

This

† Hume, hiſt. of England, vol. 1.

‡ LL. Hen. I. cap. 70.

This liberty of alienation of purchaſes is not to be underſtood generally, but only where the purchaſer had no ſon; if he had any, it may be a doubt whether he could alienate any part at this time. Certain it is, he could not the whole, even in Henry the Second's time. For this Glanville lays down the law: *Si vero queſtum tantum habuerit, is qui partem terræ ſuæ donare voluerit, tunc quidem hoc ei licet ſed non totum queſtum, quia non poteſt filium ſuum hæredem cohæredare* †.

The practice of alienating lands by deſcent grew up more ſlowly. At this time a part only was alienable, and that not freely, to all perſons, or for any conſideration generally; but only in particular caſes, firſt to the church in Frankalmoigne; ſecondly, to one who had done ſervices in war, or to the fief in time of peace; thirdly, for the advancement of his family, as in Frank-marriage with his daughter, ſiſter, niece, or couſin. But every day this liberty gained ground, until at length the intereſt of the heir entirely vaniſhed, and that of the lord began, in military tenures, to be little conſidered, and not at all in ſocage. However, in Magna Charta ſome check was given to that kind of alienation of the whole fief, that was carried on under the pretence of ſubinfeudation. *Nullus liber homo det de cætero amplius alicui vel vendat de terra ſua quam ut de reſiduo terræ poſſit ſufficienter fieri domino feudi ſervitium ei debitum;* and this ſufficiency was by practice explained to the half of the fee ‡.

No proviſion being made in theſe laws for the conſent of the lords, they generally, though not always, loſt their fines;

† Lib. 7. c. 1.

‡ Glanvil, ut ſupra. Ruffhead's ſtatutes, vol. 1. p. 8.

fines; and a method likewiſe was invented to obviate their refuſal, by levying fines in the king's courts of record, in this manner. They uſed to ſuppoſe that the parties had covenanted to alienate; and all writs of covenant (being actions of public concern to the juſtice of the kingdom) were ſueable only in the king's court; and by conſequence this covenant to alienate was ſueable only there. The ſuperior court then being poſſeſſed of the matter, as an *adverſary cauſe*, permitted the parties (on a fine being paid to the king, in lieu of that which he would have received at the end of the ſuit, from the party that failed) to make an amicable agreement or end of the ſuit, which was done by the party ſued coming in, and recognizing, that is, acknowledging in court the right of the demandant to the land. This method of conveyance by fine grew up, and ſtill continues to be one of the common aſſurances of the realm. For being tranſacted in a court of record, it obviated the danger of future controverſies between parties, or any diſpute concerning the execution of a deed, or the giving of livery and ſeizin †.

At length the ſtatute of *Quia emptores terrarum*, already mentioned, was made, as well to remedy the miſchiefs the lords complained they ſuffered by ſubinfeudation, namely, the loſs of their fruits of tenure, as to ſettle the doubt, as to the right of the tenants to alienate. This ſtatute entirely takes away the lords conſent; for it gives the tenant free power to ſell, or alien the whole, or part of his tenancy, to whom he pleaſed. But then, in favour of the lord, it eſtabliſhes, that if the tenant parts with his whole intereſt in the lands, namely, the fee ſimple, the *alienée* ſhould not hold of the *alienor*, but immediately from the alienor's lord,

† Britton, c. 18. Wright on tenures, p. 163, 164.

lord, by the ſame ſervices, by which he, the alienor, had holden. Thus were the lords, in one reſpect, ſecured in their rights, by the ſtopping the courſe of ſubinfeudations, and the tenants got a free liberty of alienation without the conſent of the lord, or paying any fine to him. The king, however, not being named expreſsly in this act, it was conſtrued not to bind him, as I have ſaid before; and his conſent was ſtill required to the alienation of his tenants by military ſervice, according to the rule of Magna Chartâ; that is, if more than half was alienated, ſo that the reſidue was deemed inſufficient to anſwer the ſervices. And this was put out of doubt by the ſtatute *De prerogativa regis*, made the 17th of Edward the Second, cap. 6.

The bent towards free alienation, however, was ſo ſtrong as to occaſion a further mitigation ſo ſoon after, as the firſt year of Edward the Third. For then it was provided, that if the king's military tenant alienated without licence, contrary to the late act, the land ſo alienated ſhould not be abſolutely forfeited as before, but that the king ſhould be contented with a reaſonable fine in Chancery. Theſe compoſitions were ſometimes diſpenſed with, to encourage the tenants to attendance in hazardous expeditions; but, except in thoſe ſingular caſes, they continued to be paid, until the reign of Charles the Second, when knight's ſervice being aboliſhed, they fell of courſe along with it ‡.

Such was the progreſs the alienation of land made by conveyance *inter vivos*; but the bequeathing lands by laſt will did not keep equal pace with it. The firſt ſtep made thereto was by laying hold of the doctrine of *uſes*, which about

‡ Staunford, de prerog. Reg. cap. 7.

about the time of Richard the Second was invented by the clergy, to elude the ſtatutes of Mortmain, by which their advance from time to time was checked. As in every feudal grant there were two eſtates, the abſolute propriety in the lord, a qualified property, namely, the poſſeſſion and profits, in the tenant; now that they were prohibited from taking the real tenancy, they cunningly deviſed a means of ſubdividing the tenancy, by ſeparating the profits from the poſſeſſion. When, therefore, a man had a mind to alienate to the church, as he could not do it directly, he infeoffed a perſon to the uſe of ſuch a monaſtery. Here the feoffee and his heirs were, in the conſtruction of the common law, the proprietors, but, in fact, were bare truſtees for the monaſtery, for the uſe of which they received the profits. But it may be aſked, if the truſtee or his heirs would not ſuffer them ſo to do, where was their remedy. The courts of common law allowed of no ſuch diviſion of eſtates at that time, nor would they have ſuffered ſuch neceſſary laws to be defeated by ſuch colluſion, though they had been acquainted with theſe divided intereſts. They had recourſe, therefore, to chancery, where, it being always, to the time of Henry the Eighth, filled with a churchman, they were ſure to meet favour; and this court claiming an equitable power to enforce perſons conſcientiouſly to fulfil their engagements, compelled the truſtee to ſupport and maintain the uſes.

Theſe uſes, once introduced, were applied to other purpoſes, particularly to that I am now upon, the enabling perſons to diſpoſe of their lands by will. The manner was thus: A. aliens his lands to B. to the uſe of A. himſelf for his life, and, after his death, to ſuch uſes as he A. ſhould, by his laſt will and teſtament, appoint. B. was then

then compellable in chancery, not only to ſuffer A. to take the profits during life, but after his death to execute the directions of the will, and to ſtand ſubject to the uſe of ſuch perſons as he appointed, and make ſuch eſtates as he directed. This method gained ground every day, as many perſons choſe to retain their power of alienation in their own hands, to the laſt moment of their lives, and to keep their heirs, or other expectants, in continual dependance. And it at length grew ſo common, that in Henry the Eighth's time, it was thought proper to give leave, without going through this round-about method, to diſpoſe of lands directly and immediately by will; of the whole of their ſocage lands, and of two thirds of the lands holden by knight's ſervice. And this latter tenure being, after the Reſtoration, turned into common ſocage, all lands, not particularly reſtrained by ſettlement, are ſince become deviſable; whereas, before theſe laws, they were only ſo in particular places, by local cuſtom. But the ſtatute that gives this power, in order to prevent frauds, expreſsly orders ſuch will to be in writing; whence aroſe a diſtinction, as to the validity of wills of land, according as theſe lands had, or had not, been before deviſable by cuſtom. For thoſe that were ſo before, continued deviſable by will *nuncupative*, or without writing †.

But the reduction of the will into writing was not found ſufficient to prevent forgery and perjury, and therefore the ſtatute of frauds and perjuries has added other ſolemnities, as requiſite to paſs lands by will. It requires that it ſhall be ſigned by the teſtator, or ſome other by his direction, and atteſted by three witneſſes in his preſence.

As

† An. 27. Hen. VIII. cap. 10. ap. Ruffhead, vol. 2. p. 226.

As to ſigning, it is inſignificant where the ſignature is, whether at the bottom, or the top, or in the context of the will, the name of the teſtator, written by his own hand, in any place, being ſufficient. And the putting his ſeal to the will, though without his writing, has been judged ſufficient; for his ſeal is as much his mark, or ſign, as his handwriting. As to the atteſtation, the ſtatute requires it to be in the teſtator's preſence; but it is abſolutely neceſſary, that he ſhould look on and ſee it done. Therefore, if it is atteſted in the room where he lies ſick in bed, with his curtains undrawn, this is a good atteſtation; or if it is atteſted in a neighbouring room, and the door open, ſo that he might poſſibly ſee it done, this is in his preſence. But if the door be ſhut, or the place ſo ſituated that he could not by any means ſee the atteſtation, the will is void.

I ſhall next proceed to *involuntary alienation* of lands, namely, for payment of debts; and then give an account of the origin and progreſs of *eſtates tail*, which were introduced to reſtrain this power of alienation, and to reſtore, in ſome degree, the old law of keeping eſtates in the blood of the firſt purchaſer.

LECTURE XVI.

Involuntary alienations of feudal land—Talliage—Edward I. introduces the firſt involuntary attachment of lands—Statutes enacted for this purpoſe—Their effects—The origin of eſtates Tail.

THE *involuntary* alienation of feudal land, namely, the attaching, and afterwards the ſelling it for debt, kept pace pretty much, but not ſtrictly, with the voluntary alienation already treated of. It firſt began in cities and trading boroughs, which were either the remains of old Roman towns, and where, conſequently, the eſtates were allodial; or elſe new towns, founded either by the kings, or other great lords; or their demeſnes, for the benefit of trades and arts within their own diſtricts. External commerce, during thoſe confuſed times, was little known or practiſed, the Barbarians of the North infeſting the coaſts of the ocean, and the Saracens and Moors, thoſe of the Mediterranean. It was the intereſt, therefore, of every lord who had ſuch a town on his territory, to give it ſuch privileges as would make it flouriſh, and outrival the towns of like nature on the lands of the king, or the neighbouring lords. For the natives of ſuch towns were no part of the feudal ſociety, but were in the nature of ſocage tenants in the early times, removeable, and conſequently ſubject to be taxed, or, as our law calls it, *talliagable*, from the French word *tailler* to cut †.

Talliage,

† Madox, hiſt. of Exchequer, ch. 17. Firma burgi.

Talliage, conſequently, was the cutting out a part from the whole of the tenant's ſubſtance, at the will of the lord. Yet this very power of talliage, which the lords were not for a long time inclined to part with, joined to their deſire to make their towns flouriſh (that they might be able to bear a greater talliage) put them under a neceſſity of making ſuch proviſions, and granting ſuch privileges, as were neceſſary for the uſe of trade and commerce, and at length, in effect, deſtroyed that abſolute power of taxation, which the king and lords had all along claimed and exerciſed, and which at firſt, for their own intereſts ſake (which no doubt they well underſtood) they had uſed with great moderation. But after the diſcovery of the civil law at Amalfi in Italy, in the reign of our Stephen, the kings of Europe, who found therein an unlimited power of taxation in the emperor, were deſirous to eſtabliſh the like authority in themſelves; and for that purpoſe began with oppreſſing their nobles with arbitrary ſcutages, or commutations for military ſervices; and the towns of their demeſne with talliages, not only arbitrary, but extravagantly beyond their power to pay without ruin †.

John of England was particularly famous for theſe extraordinary charges; for though his title to the crown was, at that time, by many of his ſubjects, and by others abroad, much doubted (as in prejudice of his elder brother's ſon Arthur then a minor) and his only juſt claim could be but by parliamentary authority, the omnipotence of which was not then ſo univerſally admitted, never was there a prince who carried his prerogative to ſuch extravagant and oppreſſive heights. This, at length, occaſioned

† Du Cange, et Spelman, voc. Tallagium. Madox, antiq. of the Exchequer, ch. 17.

the making *Magna Charta*; partly to aſſert and reſtore the ancient liberties of the nation, which had been invaded; partly to alter the old law, in ſuch particulars as had been the engines of oppreſſion. One of the chief of theſe latter remedies was the taking away the right of talliage, unleſs conſented to in parliament. And now were the boroughs emancipated, and the burgeſſes made freemen, which before they could hardly be called, while their effects lay wholly at the mercy of the lord ‡.

In the next reign they advanced in importance; for as the treaſure of the kingdom was in their hands, they were ſure to be favoured and courted on both ſides, during the fierce conteſts between the king and the barons. And in the latter end of this reign it appears they had got admiſſion into parliament, which not a little increaſed their conſequence. Edward the Firſt was a great favourer of merchants, and, for the ſecurity of their debts, introduced the firſt involuntary attachment of lands by the act called *ſtatute merchant*, in the thirteenth year of his reign ‖.

Before this time, no lands, except in boroughs by cuſtom, were attachable for debt, but only in the caſe of the king, who, by right of his prerogative, could enter on the lands of his debtor, and receive the profits, until he was paid. For the ſame political reaſon, the ſurety alſo for a debt to the king, if he paid the debt, was allowed to come in the king's place, and enjoy the ſame privilege; but in all other caſes, the chattles were the only mark for the debt. This ſtatute, after reciting that merchants had fallen into poverty, for want of a ſpeedy remedy for recovering

‡ Hume's hiſt. of England, appendix 2. Madox. Firma burgi, ch. 1.
‖ Ruffhead, vol. 1. p. 115.

vering their dues, provides, that, in every city or great town, which the king ſhould appoint, there ſhould be kept a *recognizance*, that is, the acknowledgment or confeſſion of debts due to merchants, and of the day of payment; and that, in caſe payment was not made at the day, they may, or ſhould, on the application of the merchant, and inſpection of the roll, impriſon the body of the debtor until payment; and if no payment was made within three months, (which time the debtor was allowed to ſell his chattles or lands) his chattles and lands were to be delivered to the merchant creditor, at a reaſonable valuation, or *extent*, as it is called; that out of the profits he might ſatisfy himſelf. And in caſe the debtor could not be found within the juriſdiction of the city or town, or had no chattles or lands therein, then was the mayor to ſend into chancery the recognizance of the debt, and the chancellor was to iſſue a writ to the ſheriff in whoſe bailiwick the debtor was or had effects, to act in like manner. And ſo greatly was the merchant favoured, that tho' this was but an eſtate for years (it being certain, from the valuation, in what time the debt would be paid), yet had he, with regard of maintaining actions to recover his poſſeſſion when deprived of it, the privileges of a free-holder given him, by expreſs proviſion in the act. Such was the favour ſhewn to merchants to recover their juſt demands, nor were other creditors at this time left totally unprovided for, in caſes where there was a deficiency of chattles.

In the ſame year a law was made for attaching the lands of perſons, in favour of creditors who were not merchants, but in a different manner, called an *elegit*. I ſhall here uſe the words of the ſtatute, as they are ſufficiently plain, and eaſy to be underſtood. "When debt is recovered or ac-

"know-

"knowledged in the king's courts, or damages awarded, "it ſhall be, from henceforth, in the election of him that "ſueth for ſuch debt or damages, to have a writ to the "ſheriff of *fieri facias* of the lands and goods" (which was the old remedy againſt the chattles) "or that the ſheriff "ſhall deliver to him all the chattles of the debtor, ſaving "only his oxen and beaſts of his plough, and the one half "of his land, until the debt be levied upon a reaſonable "price or extent." After this the act gives the ſame privilege as in caſe of ſtatute merchant, to the creditor diſpoſſeſſed. From his making his election for the extending the lands, the writ directed to the ſheriff for that purpoſe got the name of *elegit*. The difference of execution juſt mentioned ſhews clearly in how ſuperior a light the legiſlature regarded the intereſts of commerce. That the debts to merchants, in whoſe proſperity the whole community was concerned, might be levied as ſoon as poſſible, the ſecurity by ſtatute merchant gave poſſeſſion of the whole of the land to the creditor; but the writ of *elegit* gave him poſſeſſion of no more than one half. Originally men could not alien lands at all. Afterwards they were allowed to alien, but not beyond the half of the fief; and this principle or maxim was ſtrongly regarded at the time the writ of *elegit* was framed, which was before the ſtatute of *Quia emptores terrarum*, which allowed alienation of the whole. So that whatever ſtretches might be found neceſſary, from the circumſtances of merchandize, yet, with regard to the kingdom in general, a ſmall deviation only was made from the common law, and the *elegit* was allowed to affect no more by operation of law than a man was ſuppoſed capable of alienating by his own deed †.

Two

† An. 13. Ed. I. c. 18. apud Ruffhead, append.

Two reigns after, namely, the 27th of Edward the Third, when the mart, or market of the ſtanding commodities of England, namely, wool, woolfels, hides, lead and tin, was removed from Flanders into England, and a court merchant was erected in all ſuch places where the ſtaple was fixed, to be held by the mayor of the ſtaple, he had power given him to take recognizances on the debts contracted at the ſtaple, called *ſtatute ſtaple*, in the ſame manner as of *ſtatute merchant*; and as the effect thereof was the ſame as of ſtatute merchant, it need not be particularly repeated. However in ſome time afterwards, ſtatute merchant was, by cuſtom, extended to others beſide merchants, and became one of the common aſſurances of the realm. The ſtatute ſtaple was likewiſe extended upon ſurmiſe of the debt being contracted at the ſtaple; and though an act of Henry the Eighth in England reſtrained this latter to its ancient bounds, yet, the ſame act framed a new kind of ſecurity in imitation of it, common to all the ſubjects, called a recognizance on that act, which had all the effects and advantages of it †.

The ſtatutes of Elizabeth and thoſe ſince her time, concerning bankrupts, have gone much further. They not only, in the caſes they extend to, laid the whole land open to the creditor, but, inſtead of a poſſeſſion, and gradual diſcharge of the debt, which was all that was given by the ſtatute merchant, *elegit*, or ſtatute ſtaple, they gave him a more ſpeedy ſatisfaction, by enabling him to procure a ſale of the lands ‡. But theſe later acts having never been enacted in this kingdom, I ſhall content myſelf with having barely hinted at them, and their effects.

Volun-

† An. 23. Henry VIII. cap. 6. ap. Ruffhead, vol. 2. p. 167.

‡ An. 13. Eliz. c. 7. An. 1. James I. cap. 15. 21. James I. cap. 19. 5. George II. c. 30.

Voluntary alienations of land having gained ground, and become at length eſtabliſhed in England, contrary to the principles of the original law; and it being allowed for a maxim, that he that had a fee ſimple, had an abſolute dominion over half of his land, to diſpoſe of as he pleaſed, and, in ſome caſes, of the whole; it could not be, but that there would ariſe many perſons fond of perpetuating their eſtates in their families, and conſequently diſpleaſed at this power of alienation. The means they uſed to attain their ends was under that maxim of law, *Tenor inveſtituræ eſt inſpiciendus*, or, as we expreſs it, *Conventio vincit & dat modum donationi.* Every man therefore, abſolute maſter of his eſtate, having a right to give it on what terms he pleaſed, they began, not as before, to give lands to a man and his heirs in general, for that would have given an abſolute dominion, but to heirs limited, as to the *heirs of his body*, or to the *heirs male* of his body, or to the heirs of his body by ſuch a woman. Here it was plain enough, that none were intended to take, but ſuch as came within this deſcription; and by this means they hoped to defeat the power of alienation, to ſecure the eſtate to the perſons deſcribed, and, in failure of them, the returning or reverſion of it to themſelves or their heirs.

But the judges complying with the univerſal bent of the times to the contrary, did not give theſe grants that conſtruction they expected, upon the natural preſumption, that every perſon will have heirs of his body, and that his poſterity will continue for ever. They conſtrued this to be a fee ſimple; and yet, not entirely to diſregard the intention of the donor, to be a fee ſimple conditional; as if the words had been *to a man and his heirs*, provided he have heirs of his body, and conſequently to be alienable,

and

and forfeitable upon a certain event. And one great reaſon of making this conſtruction, I take to be the conſideration of forfeiture for treaſon and felony, which, by ſuch grants, would be defeated by another conſtruction, and men thereby rendered more fearleſs to commit crimes in thoſe troubleſome times †.

Let us ſee then what eſtate or power was in *donor* and *donée* immediately by the grant; and what, upon the performance of the condition, namely, the having iſſue. And firſt, the *donée* had immediately a fee ſimple upon the grant, contrary to Britton's opinion, that, before children born, he had only an eſtate for life, and afterwards a fee. This appears from hence, that if a man had aliened in fee before iſſue had, the donor could not have entered upon the lands for the forfeiture, which, if he was tenant for life, he might. For the alienation in fee of tenant for life is an abſolute forfeiture, and gives right of entry to the *leſſor*. The *donée*, then, having preſently a fee ſimple in him, that is, an eſtate for ever, than which there can be no greater; it was impoſſible the donor ſhould have any actual eſtate or intereſt in the lands. He had not, therefore, a *reverſion* veſted in him, that is, a certain poſitive right of the lands returning to him or his heirs, as he would have had, if an eſtate for life only had been granted. He had only a bare *poſſibility of reverter*, in caſe the donée died without iſſue; or, leaving any, that iſſue had failed.

For the ſame reaſon, of the donée's having a fee ſimple, no *remainder* could be limited in ſuch an eſtate. If land be given to A. for life or for years, and after the efflux of the

† Coke on Littleton, book 1. chap. 2. § 13.

the life or years to B, B. hath preſently a remainder in the lands for life, years, or in fee, according as the limitation of the eſtate is; becauſe it is certain that a life, or term of years, muſt expire. But if land be given to A. and the heirs of his body, and, in failure of ſuch heirs, to B. and his heirs, this remainder to B, before the ſtatute *De Donis*, was void, for B. had immediately an eſtate for ever, and therefore the limitation over to B. was rejected, as repugnant to the eſtate it depended upon.

But though, by ſuch a grant, the donée got a fee, it being clogged with a condition, he had not, to all intents and purpoſes, an abſolute power over it, either with reſpect to the donor, or his own iſſue. If the donor aliened before iſſue had, this was no bar to the donor, of his poſſibility of *reverter*; but it was a bar to the iſſue born afterwards, to enjoy the eſtate tail. For at this time fathers had a greater liberty to bar their children, than a ſtranger. Therefore, in this caſe, the *alienée* and his heirs, were to enjoy the lands while the donée, or any iſſue of his body remained. But whenever they failed, the donor's, or his heir's poſſibility of reverter, was changed into an actual reverſion, and the land became his. For now, by a ſubſequent event, it appeared, that the legal preſumption of the eſtates continuing for ever was ill founded. Neither, by the having of iſſue, was the condition performed to all purpoſes, ſo as to vaſt an abſolute fee in the *donor*; for if the donée had died without iſſue, or if his iſſue failed, without any alienation being made by either, in this caſe alſo, the donor's poſſibility was changed into an actual reverſion. But by having iſſue, the condition was ſo far performed, as to enlarge the power of the donée to three ſpecial purpoſes; firſt, to alien abſolutely, and thereby to deſtroy the right of iſſue, and the poſſibility alſo of reverter in

in the donor; ſecondly, to charge and incumber it to the prejudice of both iſſue and donor; and thirdly, to forfeit it for treaſon or felony, to the prejudice of both alſo. Such was the conſtruction the judges made of theſe grants, which, we ſee, gave, in almoſt all caſes, an unlimited power of alienating, contrary to the intention of the donor, and the form of the gift †.

But, in the thirteenth of Edward the Firſt, the lords, willing to preſerve the grandeur of their families, obtained of that monarch the famous ſtatute of Weſtminſter the ſecond, called *De Donis*, which by theſe words, *quod voluntas donatoris, ſecundum formam in charta Doni ſui, manifeſte expreſſum, de cætero obſervetur, ita quod non habeant illi, quibus tenementum ſic fuit datum ſub conditione, poteſtatem alienandi tenementum ſic datum, quo minus ad exitum illorum, quibus tenementum ſic fuerit datum, remaneat poſt eorum obitum, vel vel ad donatorem vel ad ejus hæredem, ſi exitus deficiat, revertatur* ‡, created a new kind of inheritance, *eſtates tail*, which very much reſemble the old feudal donations that were only deſcendible to the iſſue of the firſt feudatary.—Let us ſee the conſequence of theſe words. Firſt, ſince the will of the donor was to be obſerved, it followed, that neither the donée, nor his iſſue, ſhould have power to alien, incumber, or forfeit: the conſequence of which was, that he could no longer have a fee ſimple, as theſe are inſeparable incidents to ſuch an eſtate; but a leſſer eſtate, called *Fee tail*, from the French word *Tailler* before mentioned, as being, like other leſſer eſtates, carved out of the fee ſimple.

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† Wright on tenures, p. 186. et ſeq.

‡ Coke's inſtitutes, part 2. p. 332. Ruffhead, vol. 1. p. 79.

Were it to be aſked, in whom did the fee ſimple reſide? it is plain it could be in none other but the donor, who had it originally in him. Therefore, by this ſtatute, the poſſibility of reverter, which the donor had, was changed into an actual preſent intereſt, called a *reverſion in fee ſimple.* But it was not always neceſſary that the fee ſimple ſhould be in the donor; for eſtates tail, being now leſs than a fee ſimple, it became poſſible to limit a remainder thereon which ſhould be good; Thus, if a gift be made to A. and the heirs of his body, and, in failure of ſuch heirs, to B. and his heirs; in this caſe, there is no reverſion: for the donor hath parted with his whole eſtate, but A. hath an eſtate tail, and B. a remainder in fee ſimple. Many remainders may be limited on one another, as for inſtance, an eſtate may be given to A. for years, remainder to B. for life, remainder to C. in tail, remainder to D. in tail, remainder to E. in fee ſimple; but if the laſt remainder is not in fee ſimple, but in fee tail, then is the reverſion in fee ſimple to the donor.

However, although a tenant in tail after this ſtatute could alien only for his own life, his heir in tail was not allowed to enter upon the alienée without firſt proving his right in a court of law, and this is what is meant by ſaying, *though a tenant in tail could not deſtroy the eſtate tail by his alienation, yet he could continue it.* The reaſon of this is, that all eſtates of inheritance are preſumed fee ſimple, until the contrary is proved, and it would be unjuſt to remove a poſſeſſor, who came in by a title apparently fair, until the weakneſs of that title appears judicially. This rule, however, extended only to eſtates corporeal, that lay in liveries, not to incorporeal ones, that lay in grant; which ſhews that this maxim of its working a diſcontinuance proceeded from the feudal principle, of protecting the poſſeſſor, becauſe he was to do the feudal duties.

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The ſtatute to guard theſe inheritances from alienations, expreſsly provides, that even a fine levied of them in the king's courts of record ſhould be *ipſo jure* null.

The method of recovering ſuch lands ſo diſcontinued, is by a writ called a *Formedon*, from the words *forma doni*, of which writ there are three kinds, according to the title of the perſons who bring them; *formedon, in the reverter, in the deſcender*, and *in the remainder*. *Formedon in the reverter* lies for the donor or his heirs, and lay at the common law after the failure of iſſue, where the alienation was before iſſue had; but ſince the ſtatute, upon the failure of iſſue, it lies, though the alienation be after.—*Formedon in deſcender* lies for the iſſue in tail, when the anceſtor has aliened, and is given by the ſtatute. The form of it is as follows, "The king to the ſheriff of——greeting, command A. that he juſtly, and without delay, reſtore to B. ſuch a manor, &c. which C. gave to D, and the heirs of his body, and which, after the death of the ſaid D, ought to deſcend to the ſaid B. the ſon of the ſaid D. by the form of the aforeſaid gift, as he ſays." *Formedon in remainder* lies for a remainder man in tail, or his iſſue, after the particular eſtate previous to his (whether it be for years, life, or in tail) is ſpent. In the reverter, inſtead of the word *deſcend*, it is *revert*; in the remainder, *remain* †.

Having ſhewn the origin of eſtates tail, I ſhall next conſider their conſequences, and future fortune.

† Coke's inſtitutes, part 2. p. 336.

LEC-

LECTURE XVII.

The conſequences and hiſtory of eſtates Tail.

THE following are the words of my lord Coke. "When all eſtates were fee ſimple, then were "purchaſers ſure of their purchaſes, farmers of their "leaſes, creditors of their debts; the king and lords "had their eſcheats, forfeitures, wardſhips, and other "profits of their ſeignories: and for theſe, and other "like caſes, by the wiſdom of the common law, all "eſtates of inheritance were fee ſimple; and what con-"tentions and miſchiefs have crept into the quiet of the "law by theſe fettered inheritances, daily experience "teacheth us." By this enumeration of his, of the advantages that attended eſtates of fee ſimple, it is eaſy to ſee who were the ſufferers, and wherein they ſuffered, by the introduction of eſtates tail. But it is a little ſurprizing that he ſhould make ſuch a ſlip as to ſay, that before this creditors were ſecure of their debts by all eſtates being fee ſimple; when the firſt ſtatute that gave them any hold of lands was made after this ſtatute *De Donis*, in the latter end of the ſame year of the king's reign, the thirteenth of Edward the Firſt. Thoſe, indeed, who had landed eſtates at that time, and their poſterity, were great gainers hereby; but the king and the nation in general were ſufferers. The nation ſuffered by the check that commerce, then juſt ariſ-

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ing, received, by ſo much lands becoming unalienable, and the crown ſuffered in a double reſpect; firſt by the opportunity it afforded to ſtrengthen and explain the great eſtates of the lords, and ſecondly by the ſecurity it gave when enlarged.

Soon after the conqueſt, the eſtates of the Engliſh lords were enormous. William brought over an army of 60,000 men, not levied by himſelf, (for he was unable to raiſe or defray the expences of a third of that number, out of the province of Normandy,) but conſiſting chiefly of adventurers, who engaged in the expedition on the promiſe of forfeited lands, in proportion to the numbers they brought with them. Accordingly, ſome had ſeven hundred manors, others five, four, three, two, one hundred, or leſs; inſomuch, that all the lands of England, (if we except the king's demeſnes, the church lands, and the little properties annexed to cities and boroughs) were in no more than about ſeven hundred hands, the principal of which were petty princes, like the dukes and counts of France †.

William was ſenſible, from the experience of that country, how dangerous ſuch large grants would prove to the authority of the crown, and he accordingly moderated them as well as his circumſtances would permit. That the king might not be too far removed from the view of the lower people, by the interpoſition of the great lords, their immediate ſuperiors, he did not, as in France, leave the whole judicial power, and the profits of the county courts in the earls; but juſtice was adminiſtered in the king's name by his ſheriffs; who, as being deputies of the earls, were called

† Hume's hiſt. of England, vol. 1. Carte's hiſt. 382, 383, 384, 420. Brady's hiſt. append.

called *Vice Comites*, and who accounted for the profits to the king, except as for the one third, which in England was the earl's proportion; and in after times, upon new creations, the third alſo was referred to the king, and only a certain ſtipend out of it, generally twenty pounds a year, aſſigned to the earl *.

Another means he uſed of diſarming them of the too great powers immoderate eſtates would have given them, was avoiding the rock the French court had ſplit on, the giving vaſt territories, lying contiguous to each other, in fief, whereby all the followers were immediately in the view and at the call of the lords. William acted more prudently. He generally gave to an earl twenty knights fees, which was the proportion of an Engliſh earldom in the county, whoſe title he bore; perhaps thirteen, or a barony, in another county; and the remainder, he was to give, either in baronies in diſtant counties, or more generally in ſingle knights fees, diſperſed through all England. This was his general method, except to a few of his near relations, to whom he gave palatinates with *jura regalia*, which were exactly in the nature of the French dutchies and counties †.

Another prudent ſtep he took for the benefit of his ſucceſſors, was the making all his grants *feminine fiefs*. For as, in a courſe of ſeveral deſcents, it muſt happen that lineal males would frequently fail, by admitting the daughters in that caſe, theſe vaſt inheritances were frequently broken, as females ſucceeded equally. His ſucceſſors followed his plan,

* Selden, tit. hon. part 2. chap. 5. § 3.

† Ibid. § 8. and 9.

plan, and for that purpoſe, not only permitted, but encouraged their great vaſſals to alien, and diſmember their properties; and whenever a great eſcheat fell, were always ſure, unleſs there were a prince of the blood to be provided for, to divide it into many parts.

Both kings and people received the advantages, and would have received more, if this policy had continued. The immediate tenants of the crown being encreaſed in number, and leſſened in wealth, were not able to confederate ſo eaſily againſt the crown; and, ſenſible of their being weakened, had occaſion for the ſupport of the lower rank of the people, whom, conſequently, they treated with more gentleneſs and equality than before. But this ſtatute of entails put a ſtop to the progreſs that courſe of things were in; eſtates became unalienable, and indiviſible. The property of no lord could leſſen; and if it happened, as it frequently did, that they acquired, either by deſcent or marriage, or the purchaſe of an eſtate not tied up, a new entail connected it inſeparately with the old one; and thus the lords towards the end of the Plantagenet line, grew up to ſuch a pitch of power, as was dangerous to the conſtitution, and when they were divided into the factions of the York and Lancaſter, deluged the land with blood.

The king ſaw the miſchief betimes, but the miſchief was done. The act was paſſed, and to get it repealed was impoſſible. They had nothing left, but to find means to elude it by conſtruction of law, wherever they could. The ſcheme was readily embraced by the judges and lawyers, who had raiſed great outcries againſt theſe fettered inheritances, and were joined by all the trading and induſtrious people, and even by the younger branches of theſe great

families, whoſe fathers were thereby diſabled to provide for them.

The firſt means found out was by *collateral warranty*. Before this ſtatute all warranties by an anceſtor bound the heir at law, although no land deſcended from that anceſtor, upon the preſumption that no man would diſinherit his heir, without leaving him a recompence. But this could be no longer the law in general; for, if ſo, the anceſtor in tail might, by his warranty, defeat the tail, contrary to the ſtatute, which ſays, *The will of the donor ſhall be obſerved.* They therefore made now a diſtinction between a *lineal* warranty and a *collateral* one. Lineal warranty is that which is made by tenants in tail; collateral, that which is made by one who is a ſtranger to the entail. In the firſt caſe they held it no bar, unleſs aſſets deſcended; that is, an eſtate in fee ſimple, equal in value. But in the latter caſe, that no aſſets deſcended, they held it at bar as at common law †.

To illuſtrate this by an example, If lands are given to A. and the heirs male of his body, and A. aliens with warranty, this is lineal warranty, and ſhall not bind the ſon; but if B. the brother of A. who has nothing to ſay to the entail, joins in the alienation with warranty, or releaſes to the alience with warranty, or diſſeizes A, and then aliens with warranty, and dies without iſſue, ſo that A's ſon is his heir, this warranty is collateral to the entail, and without aſſets ſhould bind the ſon of A, as at common law. At firſt view it may ſeem ſurpriſing how this conſtruction gained ground againſt the expreſs words of the ſtatute, *Voluntas donatoris de cætero obſervetur;* for the will of the donor

† Coke on Littleton, lib. 3. chap. 13. § 703, 709.

donor was certainly as much defeated by a collateral, as by a lineal warranty; but the judges took advantage of the preamble of the act, which, reciting the miſchief, ſpeaks only of the alienation of the tenant in tail, that is, of lineal warranty. They reſtrained, therefore, out of diſfavour to theſe fettered eſtates, the general words in the enacting part, to the particular caſe mentioned in the preamble, on this ground, that the common law was not to be altered without it appeared undeniable that the legiſlator intended it; and here, as to the collateral alienation, they are ſilent. This was the firſt device uſed to defeat eſtates tail, namely, by getting a collateral relation, whoſe heir the iſſue in tail was to be, to concur in the alienation, and to bind himſelf and heirs to warranty; which was generally obtained for a ſmall conſideration, as ſuch perſon could never be a gainer by the eſtate tail, ſince it could in no caſe come to him.

When once this rule of collateral warranty barring an eſtate tail, was ſettled, attempts were made to prevent its taking effect, and to continue ſuch eſtate notwithſtanding. Judge Richel, in Richard the Second's time, led the way; he having ſettled lands on his eldeſt ſon in tail; remainder to his ſecond ſon in tail; adds, that the lands are given on this condition, that, if the eldeſt ſon ſhould alien, that inſtant his eſtate ſhould ceaſe and determine, and the land remain to the ſecond ſon and the heirs of his body. Here he imagined he had got clear of collateral warranty, becauſe the firſt eſtate was to determine, and the ſecond to commence immediately on the alienation, and before any collateral warranty could deſcend on the ſecond. But the judges determined this condition to be void; for which Littleton gives three reaſons, drawn rather from the art of

law, than from the principles of plain reaſon†. The true ground ſeems to be this:

In every reign, from Edward the Firſt down to Edward the Fourth, bills were brought into parliament to repeal the ſtatute *De Donis*, as Coke informs us, but had conſtantly miſcarried, as the eſtates of the majority in parliament were entailed. The only relief found out at that time againſt their miſchiefs was this collateral warranty; and if Richel's conditions were to be adjudged good, all eſtates tail would have been made with ſuch conditions, and there would have been an end of that method of defeating them. The ſame was the fate of a ſimilar ſettlement of Judge Thirning, who took the advice of his cotemporary judges, in wording his condition ſo as to make it effectual; but their ſucceſſors were of a different opinion, and rejected it. However theſe collateral warranties not being to be got in all caſes, the relief was but partial, and extended only to particular caſes. And the tenant in tail himſelf could by no act of his, in concurrence with any other perſon, except a collateral anceſtor of the iſſue in tail, bar them.

At length the judges found out a device, by a fiction in law, to enable him to bar his iſſue, and all remainders, and reverſions. A. brings his action real againſt B, tenant in tail, and alledges the lands in tail to be his A's right and inheritance, when in truth he had no title thereto; B. comes in, and voucheth C. to warranty, who enters into warranty, and after, when he ſhould defend, makes default, ſo judgment is given for A. againſt B. and for B. to recover

† Lib. 3. chap. 13. § 720.

recover in value againſt C. Here, though C. has no land to render in value, the judges have conſtrued B. and all that ſhould come after him. to be barred; becauſe if C. ever after purchaſed lands, theſe lands might be recovered from him, by virtue of the former judgment; and ſo there was a poſſibility of a recompence. Though this deciſion at firſt created great outcries, and even in Henry the Eighth's reign was but weakly defended in equity and conſcience, by the author of *Doctor and Student*, yet the judges, for the public good, conſtantly adhering to it, and theſe common recoveries being taken notice of and approved of by ſubſequent acts of parliament, are at length grown to be common aſſurances of lands, and, paſſing in the court of record, are the beſt ſecurities of eſtates †.

The bearing of eſtates tail, *by fine* paſſed in the king's courts, grew up another way, and is founded on an act of parliament in Henry the Seventh's reign, and is indeed, properly ſpeaking, a partial repeal of the ſtatute *De Donis*, ſince it puts it in the tenant in tail's power to deſtroy it, by obſerving certain ſolemnities. Though common recoveries had been invented ſome years before, yet as they had not had time to grow up to ſuch a degree of firmneſs as to be ſufficiently depended upon, their legality was ſtill doubted, and it was not certain that future judges would give them the ſame conſtruction which their predeceſſors had done. Therefore, that politic prince Henry the Seventh, who ſaw, in all its lights, that ſuperiority which the preſervation of landed property in their families gave to the nobles, a ſuperiority which had coſt ſome of his predeceſſors their lives and

Barring

† Saintgerman, cap. 50.

and crowns, freed lawyers from the trouble of inventing future devices againſt entails, by getting the famous act paſſed in the fourth year of his reign, which made a fine, with proclamations to conclude all perſons, ſtrangers as well as privies *.

It was the purport of, and ſo it is expreſſed in the ſtatute *De Donis*, that a fine levied of entailed lands ſhould be *ipſo jure* null, and it is the intent of this act, on the contrary, that a fine, levied with the preſcribed ſolemnity, ſhould be valid to bar the perſons therein intended to be barred. There is a clauſe, indeed, in this act, ſaving the right and intereſts of all perſons, which accrued after the ingroſſing of the fine, they purſuing their rights within a certain time after they accrued. This clauſe was apparently thrown in to make the act paſs, and to deceive the enactors into an opinion, that it would not affect eſtates tail; and on this clauſe a doubt occurred in that reign, whether the iſſue of tenant in tail could be barred by this ſtatute, and that, notwithſtanding by the tenor of it, privies were barred. The queſtion was, whether the ſtatute meant privie to the fine, or privies to the eſtate of the perſon levying it? The iſſue were not privies in the firſt ſenſe, but were in the latter. The judges embraced the opportunity this ambiguity gave them, of defeating entails, and bound the iſſue by the fine. A ſtatute of the ſucceeding prince approved of that conſtruction, gave it retroſpect, and prevented all ambiguity for the future †.

Thus

* Bacon, voc. Fine and Recovery. An. 4. Hen. VII. c. 24. ap. Ruffhead, vol. 2. p. 79.

† An. 32. Hen. VIII. c. 36. ap. Ruffhead, vol. 2. p. 296.

Thus were eſtates tail no longer certain perpetuities, but defeaſible upon performing certain requiſite ſolemnities. Still however they continued not to be forfeitable for crimes, which was a point not to be got over without an act of parliament, and there was little likelihood of obtaining ſuch an one; but Henry the Eighth ſnatched the lucky opportunity his ſituation gave him, of gaining this important point, in the 26th year of his reign, when he had quarrelled with the Pope, and all hope of accommodation vaniſhed; when a ſentence of excommunication was denounced againſt him, and numbers of his ſubjects, many of them of great fortunes, bigotedly attached to the old religion, were known to meditate rebellion. The parliament, the majority of which were of the new profeſſion, ſeeing no other means to preſerve the ſecurity of the ſtate, and the proteſtant religion, yielded at length to the paſſing of an act for that purpoſe †.

However, there were not wanting perſons after this, willing to create perpetuities, in which they were always diſappointed by the deciſion of the judges. The firſt device was by giving eſtates upon condition, that if tenants in tail ſhould levy a fine, or ſuffer a recovery, the eſtate ſhould ceaſe, and go over to the next iſſue intitled. But the judges rejected ſuch condition, for the ſame reaſon as in Richel's caſe. They adjudged the right of barring by a fine or recovery to be an incident inſeparable to a fee tail, and all conditions repugnant thereto idle and void; for how could the law ſuffer that an eſtate, by previous act of the donor, ſhould, upon a judgment at law, become veſted in any other perſon than him who recovered? Theſe ingenious conveyancers, finding that the limitation upon breach of the

† Ruffhead, vol. 2. p. 216.

the condition came too late, as the eſtate had already gone in another channel, framed the condition thus; that *if tenant in tail ſhould go about to levy*, &c. *or make any covenant to levy, or hold any communication about levying*, &c. *the eſtate ſhould then*, &c. But theſe were all condemned upon the old principle, and ſtill more for their vagueneſs and uncertainty.

LEC-

LECTURE XVIII.

The conſtitution of a feudal monarchy—The dignity and revenues of the King—An examination of his power as to the raiſing of taxes and ſubſidies.

AS, in my former lectures, I drew a general ſketch of the nature and form of the governments that prevailed among the northern nations whilſt they remained in Germany, and what alterations enſued on their being removed within the limits of the Roman empire, it will be now proper to ſhew, in as brief a manner as may conſiſt with clearneſs, the nature and conſtitution of a feudal monarchy, when eſtates were become hereditary, the ſeveral conſtituent parts thereof, and what were the chief of the peculiar rights and privileges of each part. This reſearch will be of uſe, not only to underſtand our preſent conſtitution, which is derived from thence, but to make us admire and eſteem it, when we compare it with that which was its original, and obſerve the many improvements it has undergone. From hence, likewiſe, may be determined that famous queſtion, whether our kings were originally abſolute, and all our privileges only conceſſions of theirs; or whether the chief of them are not originally inherent rights, and coeval with the monarchy; not, indeed, in all the

the ſubjects, for that, in old times, was not the caſe, but in all that were *freemen*, and, as all are ſuch now, do conſequently belong to all.

To begin with the king, the head of the political body. His dignity and power were great, but not abſolute and unlimited. Indeed, it was impoſſible, in the nature of things, even if it had been declared ſo by law, that it could have continued in that ſtate, when he had no ſtanding force, and the ſword was in the hand of the people. And yet it muſt be owned his dignity was ſo high, as to give a ſuperficial obſerver ſome room, if he is partially inclined, to lean to that opinion. All the lands in his dominions were holden of him. For, by degrees, the *allodia* had been changed into, and ſuppoſed to have been derived from, his original grant, and conſequently revertible to him. But then, the land proprietors had (on fulfilling the conditions they were bound to) a ſecure and permanent intereſt in their poſſeſſions. He could neither take them away at pleaſure, nor lay taxes or talliages on them by arbitrary will, which would have been little different. Since in Magna Charta, we find the people inſiſting that the king had no right to aſſeſs the quantity of eſcuage, which was a pecuniary commutation for military ſervice, nor to lay talliages on his other ſubjects, but that both muſt be done in parliament. He was a neceſſary party to the making new laws, and to the changing and abrogating old ones; and from him they received their binding force, inſomuch that many old laws, tho' paſſed in parliament, run in the king's name only. For, in thoſe days, perſons were more attentive to ſubſtance than forms; and it was not then even ſuſpected, in any nation of Europe, that any king would arrogate to

to himſelf a power ſo inconſiſtent with the original freedom of the German nations. Nay, in France, to this day, the king's edicts are not laws, until regiſtered in parliament, which implies the conſent of the people, tho' that conſent is too often extorted by the violent power that monarch has aſſumed over the perſons and liberty of the members of that body *.

The dignity of the king was ſupported, in the eyes of the people, not only by the ſplendor of his royalty, but by the lowly reverence paid him by the greateſt of his lords. At ſolemn feaſts they waited on him on the knee, or did other menial offices about his perſon, as their tenures required, and did their homage and fealty with the ſame lowly and humiliating circumſtances that the meaneſt of their vaſſals paid to them. His perſon likewiſe was ſacred, and guarded by the law, which inflicted the moſt horrible puniſhment for attempts againſt him; neither was he to be reſiſted, or accountable for any private injury done perſonally by himſelf, on any account whatſoever. For the ſtate thought it better to ſuffer a few perſonal wrongs to individuals, than to endanger the ſafety of the whole, by rendering the head inſecure.

But the greateſt of the kingly power conſiſted in his being entirely entruſted with the executive part of the government, both at home and abroad. At home juſtice was adminiſtered in his name, and by officers of his appointment. He had, likewiſe, the diſpoſal of all the great offices

* Hottoman. Franco-Gall. Boulainvilliers on the antient parliaments of France. Forteſcue de laud. leg. Angl. cap. 34, 36.

offices of the ſtate, with an exception of ſuch as had been granted by his predeceſſors in fee, and of all other offices and employments exerciſed in the kingdom immediately under him. Abroad he made war and peace, treaties, and truces as he pleaſed. He led his armies in perſon, or appointed commanders; and exerciſed, in time of war, that abſolute power over his armies that is eſſential to their preſervation and diſcipline. But how was he enabled to ſupport the expence of the government, or to provide for the defence of the kingdom, or carry on a foreign war; ſince, if he was not furniſhed in that reſpect, theſe high-ſounding prerogatives had been but empty names, and the ſtate might have periſhed? and if he could at pleaſure levy the neceſſary ſums, he being ſole judge of the neceſſity, both as to occaſion and quantity, as Charles the Firſt claimed in the caſe of ſhip-money, the ſtate of the ſubject was precarious, and the king would have been as abſolute a monarch as the preſent king of France or Spain *.

But abundant proviſion was made on this head, and that without over-burdening the ſubject, for ſupporting the ordinary expences of the government. A vaſt demeſne was ſet apart to the king, amounting, in England, to one thouſand four hundred and twenty-two manors, as alſo many other lands, which had not been erected into manors. Beſides theſe, he had the profits of all his feudal tenures, his wardſhips, marriages, and reliefs; the benefit of eſcheats, either upon failure of heirs or forfeiture; the goods of felons and traitors; the profits of his courts of juſtice; beſides many other caſualties, which amounted to an immenſe revenue; inſomuch, that, we are informed, that William

* Craig, de feud. lib. 1. dieges. 16. Du Dange voc. Dominium.

William the Conqueror had L. 1061 : 10s. a-day, that is, allowing for the comparative value of money, near four millions a-year; ſo that Forteſcue might well ſay, that, originally, the king of England was the richeſt king in Europe. Such a ſum was not only ſufficient for the occaſions of peace, but out of it he might ſpare conſiderably for the exigencies of war *.

This revenue, however great, was not ſufficient to ſupport a war of any importance and continuance, beſides the extraordinary expence of government. It remains, therefore, to ſee what proviſion this conſtitution made, in addition to what the monarch might ſpare, for the defence of England, as it might be attacked either by land or ſea. For the former, every ſeaport was, in proportion to its ability, obliged to find, in time of danger, at their own expence, one or more ſhips properly furniſhed with men and arms; which, joined to ſuch other ſhips as the king hired, were, in general, an overmatch for the invaders. But if the enemy had got footing in the country, the defence at land was by the knights or military tenants who were obliged to ſerve on horſeback in any part of England; and by the ſocage tenants, or infantry, who, in caſe of invaſion, were likewiſe obliged to ſerve, but not out of their own country, unleſs they themſelves pleaſed, and then they were paid by the king.

With reſpect to carrying on *offenſive* war into the enemy's country, the king of England had great advantages over any other feudal monarch. In the other feudal kingdoms the military vaſſals were not obliged to ſerve in any

* Madox, hiſt. Excheq. Carte's hiſt. of England, vol. 1. p. 423.

any offenſive war, unleſs it was juſt, the determination of which point was in themſelves; but William the Conqueror obliged all to whom he gave tenures to ſerve him *ubicunque*; and though he had not above three hundred, if ſo many, immediate military tenants under him, yet theſe were obliged, on all occaſions, to furniſh ſixty thouſand knights compleatly equipped, and ready to ſerve forty days at their own expence. If he wanted their ſervice longer, he was obliged to obtain it on what terms he could. There is, therefore, no reaſon to wonder that the king of England, though maſter of ſo comparatively ſmall a territory, was, in general, an overmatch, in thoſe early times, for the power of France. As for *infantry* in his foreign wars, he had none obliged to attend him. Thoſe he had were ſocage tenants, whoſe ſervices were certain; ſo that he was obliged to engage, and pay them, as hired ſoldiers. As the ſocage tenants in his dominions had a good ſhare of property, and enjoyed it without oppreſſion, it is no wonder the Engliſh archers in thoſe days had a gallant ſpirit, and were as redoubtable as the Engliſh infantry is at preſent.

To ſupport theſe military tenants, who ſerved after the neceſſary time, and likewiſe his infantry (as the ſurplus of his ordinary revenue would not ſuffice) he had *cuſtoms* and *talliages*, and *aids* and *ſubſidies* granted by parliament. Theſe cuſtoms, or ſo much paid by merchants on the exportation of goods, were of two kinds; as paid either by *merchant ſtrangers*, or by *merchant denizens* †.

The

† Carte, ibid. Hume, append. 2. Madox, antiq. of the Excheq. paſſim.

The cuſtoms paid by merchant ſtrangers were not originally ſettled by act of parliament, but by a compact between the merchant ſtrangers and king Edward the Firſt. In the Saxon times the king had a power of excluding ſtrangers from his kingdom, not merely with an intention of inducing their own people to traffick, but chiefly to keep out the Danes, who were the maſters of the ſea; leſt, under pretence of trade, they might get footing in, and become acquainted with the ſtate of the kingdom. They were, accordingly, admitted by the kings upon ſuch terms as the latter were pleaſed to impoſe; but Edward, who had the ſucceſs and proſperity of his kingdom at heart, came to a perpetual compoſition with them; gave them ſeveral privileges, and they gave to him certain cuſtoms in return. What ſhews they had their origin from conſent is, that the king could not raiſe them without applying to parliament. The cuſtoms of natives or denizens were, certainly, firſt given to the king by parliament; though this has been denied by ſome, merely becauſe no ſuch act is to be found, as if many of the antient acts had not been loſt; but there are acts and charters ſtill extant, which expreſsly ſay they were appointed and granted by parliament, without the power of which they could not be either altered or enlarged.

The difference between the cuſtoms and the other aids I have mentioned, *viz.* talliages and ſubſidies, is, that the latter were occaſional, granted only on particular emergencies, whereas the *cuſtoms* were for ever. If it be aſked how they came to be granted in that manner, we muſt refer back to the original ſtate of boroughs and their inhabitants, traders, in the feudal law. In France, the Roman towns were taken into protection, and had their antient privileges allowed

allowed them; but in the ſeries of wars that happened in that country for ages, every one of them in their turns were ſtormed, and reduced to vaſſalage, either to the king or ſome other great lord; and as, now, theſe lords had learned that the Roman emperor laid on taxes at his pleaſure, it was but natural they ſhould claim the ſame right, eſpecially over towns they had taken in war. The burgeſſes, therefore, became in the nature of villains, not indeed of common villains, for that would abſolutely have deſtroyed trade, but with reſpect to arbitrary taxation, which, however, if the lord was wiſe, was never exorbitant. In England, I apprehend, they became villains; for the Saxons were a murdering race, and extirpated the old inhabitants. However, wiſe kings, conſidering the advantages of commerce, by degrees, beſtowed privileges on certain places, in order to render them flouriſhing and wealthy; and at length, about the time of Magna Charta, or before, when every uncertain ſervice was varying to a certainty, this privilege was obtained for merchant adventurers. But the other burgeſſes, that did not import or export, and likewiſe villains, were ſtill talliageable at will. This was reſtrained by Magna Charta, which declares all talliages unlawful, unleſs ordained by parliament †.

To come to the latter head, whether taxes, aids, and ſubſidies can be aſſeſſed by the king, as ſole judge of the occaſion, and the *quantum*—or whether they muſt be granted by parliament, was the great and principal conteſt between the two firſt princes of the unfortunate houſe of Stuart and their people, and which, concurring with other cauſes, coſt the laſt of them his life and throne. To ſay nothing

† Firma Burgi, ch. 4. 5. 11.

nothing of the divine hereditary right urged on the king's behalf, and which, if examined into ſtrictly, no royal family in Europe had leſs pretenſions to claim, both ſides referred themſelves to the antient conſtitution for the deciſion of this point. The king's friends urged that all lands were holden from him by ſervices, and that this was one of his prerogatives, and a neceſſary one to the defence of the ſtate. They produced ſeveral inſtances of its having been done, and ſubmitted to, not only in the times of the worſt, but of ſome of the beſt kings; and as to acts of parliament againſt it, they were extorted from the monarchs in particular exigencies, and could not bind their ſucceſſors, as their right was from God.

The advocates of the people, on the other hand, inſiſted, that, in England, as in all other feudal countries, the right of the king was founded on compact; that William the Conqueror was not maſter of all the lands in England, nor did he give them on theſe terms; that he claimed no right but what the Saxon kings had, and this they certainly had not; that he eſtabliſhed and confirmed the Saxon laws, except ſuch as were by parliament altered; that he gave away none but the forfeited lands, and gave them on the ſame terms as they were generally given in feudal countries, where ſuch a power was in thoſe days unknown. They admitted, that, in fact, the kings of England had ſometimes exerciſed this power, and that, on ſome occaſions, the people ſubmitted to it. But they inſiſted, that moſt of the kings that did it were oppreſſors of the worſt kind in all reſpects; that the ſubjects, even in ſubmitting, inſiſted on their ancient rights and freedom, and every one of theſe princes afterwards retracted, and confeſſed they had done amiſs. If one or two of the beſt and wiſeſt of

their kings had practiſed this, they inſiſted that their anceſtors acquieſcence once or twice, in the meaſures of a prince they had abſolute confidence in, and at times when the danger, perhaps, was ſo imminent as to ſtare every man in the face, (for it was ſcarce ever done by a good prince) as when there was not a fleet already aſſembled in the ports of France to waft over an army, ſhould not be conſidered as conveying a right to future kings indiſcriminately, as a ſurrender of their important privileges of taxation. They inſiſted that theſe good and wiſe kings had acknowledged the rights of the people; that they excuſed what they had done, as extorted by urgent neceſſity, for the preſervation of the whole; that, by repeated acts of parliament, they had diſavowed this power, and declared ſuch proceedings ſhould never be drawn into precedent. They obſerved, that there was no occaſion for the vaſt demeſne of the king, if he had this extraordinary prerogative to exert whenever he pleaſed. They denied the king's divine right to the ſucceſſion of the crown, and that abſolute unlimited authority that was deduced from it. They inſiſted that he was a king by compact, that his ſucceſſion depended on that compact, though they allowed that a king intitled by that compact, and acting according to it, has a divine right of government, as every legal and righteous magiſtrate hath. They inferred, therefore, that he was a limited monarch, and conſequently that he and his ſucceſſors were bound by the legiſlative, the ſupreme authority †.

The advocates of the king treated the original compact as a chimera, and deſired them to produce it; which the other ſide thought an unreaſonable demand, as it was, they alledged, tranſacted when both king and people were utterly

† Bibliotheca politica, Dial. 5. and 10.

terly illiterate. They thought the utmoſt proof poſſible was given by quoting the real acts of authority, which the Saxon kings had exerciſed; among which this was not to be found; that the Norman kings, though ſome of them had occaſionally practiſed it, had, in general, both bad and good princes, afterwards diſclaimed the right, and that, it never had (though perhaps ſubmitted to in one or two inſtances) been given up by their anceſtors, who always, and even to the face of their beſt princes, inſiſted that it was an encroachment on thoſe franchiſes they were intitled to by their birthright.

Such, in general, were the principles on which the arguments were maintained on both ſides: for to go into *minutiæ*, would not conſiſt with the deſign of this undertaking. I apprehend it will be evident from this detail of mine, though I proteſt I deſigned to repreſent both ſides fairly, that I am inclined to the people in this queſtion. I own I think that any one that conſiders impartially the few monuments that remain of the old Saxon times, either in their laws or hiſtories, the conſtant courſe ſince the conqueſt, and the practice of nations abroad, who had the ſame feudal policy, muſt acknowledge, that though this right was claimed and exerciſed by John, Henry the Third, Edward the Firſt, Second, and Third, Richard the Second, and Henry the Eighth, it was in the event diſclaimed by every one of them, by the greateſt of our kings, Edward the Firſt and Third, and Henry the Eighth, with ſuch candour and free will, as inforced confidence in them; by the others, in truth, becauſe they could not help it. I hope I ſhall ſtand excuſed, if I add, that the majority of thoſe who engaged in the civil war, either for king Charles, or againſt him, were of the ſame opinion. For, had he

not given up this point, (and indeed he did it with all the appearances of the greateſt ſincerity) he would not have got three thouſand men to appear for him in the field. But, unfortunately for his family, and us, (for we ſtill feel the effects of it from the popiſh education his offspring got abroad) his conceſſion came too late. He had loſt the confidence of too many of his people, and a party of republicans were formed; all reaſonable ſecurities were certainly given; but upon pretence that he could not be depended upon, his enemies prevailed on too many to inſiſt on ſuch conditions, as would have left him but a king in name, and unhinged the whole frame of government. Thus the partizans of abſolute monarchy on one ſide, and the republicans, with a parcel of crafty ambitious men, who for their own private views affected that character, on the other, rented the kingdom between them, and obliged the honeſt, and the friends to the old conſtitution, to take ſide either with one party or other, and they were accordingly, for their moderation and deſire of peace, and a legal ſettlement, equally deſpiſed which ever they joined with †.

I ſhall make but one obſervation more; that though it is very falſe reaſoning to argue from events when referred to the deciſion of God, as to the matter of right in queſtion; I cannot help being ſtruck with obſerving, that though this has been a queſtion of five hundred years ſtanding in England, the deciſion of providence hath conſtantly been in favour of the people. If it has been ſo in other countries for two hundred or two hundred and fifty years paſt, which is the utmoſt, let us inveſtigate the cauſes of the difference, and act accordingly. The ancients tell us it

† Biblioth. polit. 320. 330. 333. 339. 356. 357. 370.

it is impoſſible that a brave and virtuous nation can ever be ſlaves, and, on the contrary, that no nation that is cowardly, or generally vicious, can be free. Let us bleſs God, who hath for ſo long a time favoured theſe realms. Let us act towards the family that reigns over us, as becomes free ſubjects, to the guardians of liberty, and of the natural rights to mankind; but above all, let us train poſterity, ſo as be deſerving of the continuance of theſe bleſſings, that Monteſquieu's prophecy † may never appear to be juſtly founded.

"England (ſays he) in the courſe of things, *muſt* loſe her liberties, and then ſhe will be a greater ſlave than any of her neighbours."

† L'Eſprit des loix, liv. 11. chap. 6.

LECTURE XIX.

The King's power as to the making, repealing, altering, or diſpenſing with laws.

HAVING, in the laſt lecture, begun to draw the outlines of a feudal monarchy, particularly, as it anciently was in England, in order that it may be more eaſy to underſtand the nature of our preſent conſtitution; and to ſee how far, and in what particulars, it has deviated from its original, either for the better, or the worſe; and having, for that purpoſe, begun with the regal prerogatives, and particularly with that important one, the raiſing of money, it will be proper to proceed to the king's power as to the *laws*, either in the making, repealing, altering, or diſpenſing with them: for theſe powers are now exerciſed by the ſovereigns in almoſt all the monarchies that were antiently feudal, and have been claimed likewiſe in England. That this power could not originally have been in the king in any feudal ſtate, is plain from the detail I have given of the old German governments, and of the gradual progreſs and formation of the European kingdoms from thence; and it would not only be an entertaining, but uſeful ſtudy for gentlemen of fortune, to trace, through the hiſtory of every nation, the ſeveral ſteps whereby the liberties of the people have been undermined, until the whole power hath ſettled in the monarch; but I

ſhall

ſhall content myſelf with a few obſervations on this ſubject, drawn from the Hiſtory of England, and ſuch as, in my apprehenſion, will be ſufficient to ſettle this point as to us.

If the monarchies on the continent were not abſolute in this reſpect, much leſs could the Saxon kings pretend to ſuch a power, from the very nature of the foundation of their kingdoms. The Franks, the Goths, the Burgundians, and others on the continent, were led to conqueſt by thoſe who had been previouſly their kings, and who had a ſtable and ſettled authority over them. Very different was the ſettlement of the Saxons in Britain. Neither Hengiſt, nor any of their firſt kings, had been kings in Germany. They were mere leaders of companies of freebooters, who had aſſociated themſelves firſt for plunder, and afterwards to fix themſelves in new ſeats, in imitation of the other German nations. Their leaders, therefore, could have no powers, but what were conferred upon them by their followers; and that *law-making* was not one of thoſe powers, appears from the frequent meetings of their *witenagemots*, which was the name they gave to their general aſſemblies, or parliaments; and from all the laws of theirs now extant being made in them. It was the boaſt of the good and wiſe king Alfred, that "he left the peo-"ple of England as free as the internal thoughts of man," a ſpeech which could never have proceeded from the mouth of one who had the leaſt notion of the almighty power of kings over the laws. His ſucceſſors were of the ſame opinion. The law of Edward the Confeſſor, which was ratified by the Conqueror, ſays, *Debet rex omnia rite facere in regno, & per judicium procerum regni*, and if *omnia*, ſurely the making and repealing of laws, the moſt important of all †.

Our

† Aſſer, de Geſtis Alfredi. Tyrrel, gen. introduct. to the hiſt. of England.

Our hiſtorians and records from that time down undeniably ſhew who, in every age, were the legiſlators, and that the kings alone were not ſo. The ſame is expreſsly delivered by all the old writers on the law, Glanville, Bracton, Britton, Fleta and Forteſcue. Nay, ſome of them, in their zeal for liberty, have gone ſo far, as to pervert the meaning of the civil law, which, in their time, was in high repute, and to deny the abſolute power of legiſlation to the Roman emperor. The civil law ſays, *Quod principi placet legis habet vigorem;* but how doth Bracton comment upon it? *Id eſt non quicquid de voluntate regis temere præſumptum eſt, ſed animo condendi jura, ſed quod conſilio magiſtratuum ſuorum, rege auctoritatem præſtante, & habita ſuper hoc deliberatione & tractatu, recte fuerit definitum* †.

It muſt, however, be owned that many of our princes were very deſirous of aſſuming this power. In the reign of our Henry the firſt, a perfect copy of the civil law being diſcovered at Amalfi, the princes of Europe got an idea of a monarchy more powerful and abſolute than either kings or people had for many centuries before any notion of; and they were, in general, deſirous enough to ſtretch, if they could, their limited prerogative to the height of the ancient imperial deſpotiſm; but to do this by their own authority was impoſſible. A wiſer way was purſued. The excellency of this law was, on every occaſion, extolled, not only as providing remedies, and determining, in many caſes, where the feudal cuſtoms were ſilent, but on account alſo of its juſtice and equity; praiſes that, it muſt be owned, do belong to this law where the abſolute authority of the prince is not concerned. Foundations for the teaching

† Lib. 3. cap. 9. fol. 107.

ing this law were eſtabliſhed in all the univerſities, and the proficients therein were ſure of ample encouragement †.

The popes, likewiſe, who wanted to ſet themſelves up in the ſeat of the old emperors, contributed not a little, in thoſe days of ignorance, to ſpread it; ſo that it is not wonderful that it got ground in every country almoſt on the continent; and being melted into, and conjoined with the feudal cuſtoms, contributed not a little to the deſtruction of the freedom of the antient conſtitutions. The ſame method was attempted in England, but not with the like ſucceſs. The foundation of profeſſorſhips, the introducing that law, and its forms, into the courts that were more immediately under the king's influence, as the courts of the conſtable, the admiral, and of the univerſities, and the high employments its profeſſors obtained, ſufficiently ſhew the fondneſs many of our kings had for it. But the common lawyers and parliament perceived the deſign, and foreſaw the conſequences that might follow. Their oppoſition was ſteady and ſucceſsful; and if they did not baniſh it from the courts wherein it had got footing, at leaſt they ſo limited and circumſcribed it, as to prevent its future progreſs.

The kings who had any wiſdom or prudence, in order to diſſemble their real deſign, gave way to theſe reſtrictions, and waited for more favourable opportunities; but the imprudent and haughty Richard the Second avowed himſelf an open patron to this law. When the duke of Ireland, the archbiſhop of York, and others his minions, were accuſed in parliament of high treaſon, and the evidence being known to be ſo full as that they muſt be convicted, he made this weak attempt to ſcreen them. He got his judges, who

† Giannone's hiſt. of Naples, lib. 11. chap. 2. Hume's hiſt. of England, vol. 2. p. 441.

who were his creatures, to declare the proceedings againſt theſe perſons null and void, as not being regulated according to the forms preſcribed by the civil law: but the barons, provoked at ſuch a bare-faced attempt, inſiſted they were regular, as agreeable to their own cuſtoms, and declared poſitively they would never ſuffer England to be governed by the Roman civil law, and paſſed ſentence of high treaſon againſt the judges *.

Whence that king's fondneſs for this law aroſe, may be ſeen from the uſe he put it to, the protection of the inſtruments of his tyrannical adminiſtration; and from the many wild and unguarded declarations he made, eſpecially that relative to his commons, *that ſlaves they were, and ſlaves they ſhould be*, and to his parliament, *that he would not at their requeſt diſcharge the meaneſt ſcullion in his kitchen.* But tho' this prince was pleaſed to ſay, that *the laws were in his breath, and that he could make and unmake them at pleaſure*, he did not think the time was come to put that vaunt in execution. He took, therefore, another way of uſurping the legiſlative power. Having gained over a majority of the returning officers, and either intimidated or gained over the moſt powerful of the nobility, he called the famous parliament at Shrewſbury, after having nominated to the returning officers whom they ſhould return; and, as he expected, this parliament, if ſo it may be called, was complaiſant enough to compliment the king with his heart's deſire. The former ſentence againſt the judges was reverſed, and conſequently the civil law ſet up as the ſtandard in trials of treaſon. And they indirectly transferred the whole legiſlative power to the ſovereign in the following manner.

As

* Diſſertatio Seldeni ad Fletam, cap. 7.

As there had been many petitions left unanſwered, and many motions undecided, they gave the power of deciding theſe, or other matters that might ariſe before the next parliament, to the king, twelve peers, and ſix commoners. For this committee, they choſe ſuch perſons, the majority of whom were at the devotion of the king, and gave him and the majority power to fill up vacancies; thereby rendering the calling any future parliament abſolutely unneceſſary. Thus was the conſtitution ſubverted, and in its ſtead ſet up an *oligarchy* in appearance, but in truth an abſolute monarchy. But as wiſely and happily as Richard thought he had conducted this affair, by which he ſuppoſed he had gained his long wiſhed-for end, neither the ſeeming authority of parliament, nor the anathemas thundered in the pope's bull againſt the contravenors, could ſatisfy the people that they were not ſtripped of their ancient rights, or that the king and his committee were rightful legiſlators. What ſentiments the nation entertained appears, from their deſerting him as one man, and following the firſt ſtandard that was ſet up againſt him†.

Since the days of this unfortunate Richard, no king of England hath, in open and expreſs terms, aſſumed to himſelf ſingly the right of legiſlation. Though James the Firſt plainly claimed it, by implication, in many of his ſpeeches, particularly in thoſe famous words of his, *that as it was blaſphemy for man to diſpute what God might do in the plenitude of his omnipotence, ſo was it ſedition for ſubjects to diſpute what a king might do in the fulneſs of his power.* But it would be doing injuſtice to the houſe of Stuart not to acknowledge that

† Bacon, hiſt. and polit. diſcourſe on the laws and government of England, part 2. ch. 1. and 2. The reign of Rich. II. in Kennet's collection of hiſtorians.

that ſome of the princes before them, particularly the Tudors, tho' they did not pretend to make laws, yet iſſued out many proclamations, or *acts of eſtate*, as they were afterwards called, to which they exacted the ſame unlimited obedience as if they had been laws enacted by parliament. This is a point worthy conſideration; for if all proclamations, or acts of the king and his council, require unlimited obedience, it is to little purpoſe whether we call them laws or not, ſince ſuch they are in effect. But this, I think, will be pretty plain, if we make a proper diſtinction between ſuch proclamations, or acts of the king, as are particular exertions of the executive power, which the law and conſtitution hath entruſted him with, and ſuch as, affecting the whole people, ſhould in any wiſe alter, diminiſh, or impair the rights they were before lawfully in poſſeſſion of.

To give ſome few inſtances of the firſt ſort. The appointment of magiſtrates, the proclaiming war or peace, the laying on embargoes, or performance of quarantine, the ordering erection of beacons in times of danger of an invaſion, the granting of eſcheated or forfeited eſtates, and many more, are the antient and undoubted prerogatives of the king alone, and the ſubject who reſiſts, or diſobeys, in ſuch caſes, is as much a *rebel*, or diſobedient ſubject, as if theſe acts were exerciſed by the whole legiſlature. But with reſpect to making general rules and ordinances, affecting the previous rights of the people, the caſe is very different. For if ſuch were to be univerſally obeyed, it is equivalent to ſaying, that ſubjects have, properly ſpeaking, no rights at all, but hold every thing at the will of the king; a ſpeech which the moſt deſpotic monarch in Europe would not venture to advance.

However,

However, I will not carry this ſo far as to deny that there may caſes happen wherein the king may have this right, and wherein his proclamations and orders, even relating to ſuch points, ought to be obeyed. The caſes, I mean, are thoſe of a foreign invaſion, or inteſtine rebellion, when the danger is too imminent to attend the reſolutions of parliament. In ſuch caſes the conſtitution is, for a time, ſuſpended by external violence, and as *ſalus populi ſuprema lex eſt*, every man is under an obligation to uſe his utmoſt endeavours to reſtore it, and, conſequently, obliged to obey him, to whom the conſtitution has particularly entruſted that care. Inſtances of this kind did happen during the confuſions raiſed by the houſes of York and Lancaſter, and the princes were accordingly obeyed. Theſe precedents doubtleſs gave a handle to their ſucceſſors, who had no competitors to the throne, to exerciſe the ſame power in more ſettled times. But this was uſed, at firſt, in a cautious and ſparing manner; and Henry the Eighth, who was a monarch as unlikely to make undue condeſcenſions to his people as ever lived, was glad to derive it from the grant of parliament that his proclamations ſhould have the force of laws, which was, in truth, giving into his hands the legiſlative power for life †.

His great ſucceſſor, Elizabeth, carried this practice farther, and it will be worth while to diſcover the reaſon why a people, in antient times, ſo jealous of their privileges, ſhould to the one prince explicitly give up, and quietly ſuffer the other to uſurp this power, ſo eſſential to a limited conſtitution. And the cauſe I take to be the critical ſtate the nation ſtood in with reſpect to religion. The bulk of the people, glad to be delivered from the yoke of papal tyranny,

† Hume's hiſt. of England, vol. 2.

ranny, and dreading its reſtoration, were willing to arm their princes with a power ſufficient to protect their religion from foreign and domeſtic enemies; and about religion indeed, this power was at firſt principally exerciſed, on the footing of the papal ſupremacy being transferred to the king. Their end was attained: Papiſts and Puritans were both kept under, and happy in the enjoyment of their religion, they did not conſider the conſequences; that this very weapon might be uſed, by a prince of another ſtamp, to root out the very religion they were ſo fond of, and that, by admitting this exertion of power in a matter of ſo high conſequence, it would naturally be uſed in others that appeared of leſs †.

This was what accordingly happened. Proclamations on other points were iſſued; and monopolies in trade were introduced. All monopolies, undoubtedly, were not deſtructive to trade. Where a new traffick has been diſcovered, and one that requires a large expence, and is liable to many hazards, it is very reaſonable that the firſt undertakers ſhould have the trade for a time confined to them, that, by the proſpect of extraordinary profit, they may be encouraged to promote and ſettle that commerce on a ſolid bottom. Such monopolies, inſtead of hurting, tend to the promotion of traffick, and are not without ſimilar inſtances in former times, I mean the kings of England appointing the towns for the ſtaple; and had Elizabeth and James confined themſelves to the erection of the Ruſſia, the Turky, and Eaſt India companies, and that for a limited term, their conduct would have deſerved the higheſt applauſe; but that was far from being the caſe. Monopolies were

† Cambden's reign of Elizabeth, paſſim.

were introduced in the antient, the moſt common and moſt neceſſary commodities, to the great impoveriſhment of the nation by the advance of prices.

At firſt it may ſeem ſtrange that the wiſe Elizabeth, who, on all occaſions, ſeemed to have her people's wealth and eaſe at heart, ſhould follow ſo deſtructive a courſe. But the great end of all her actions was the ſecuring herſelf on the throne, and one of the principal means ſhe uſed for that end, was the aſking money from her people as ſeldom as poſſible. Hence proceeded the long leaſes of the crown lands, at ſmall rents and large fines, and hence all the monopolies, which ſhe ſold to the undertakers; but better had it been for her ſubjects, to have raiſed the ſums ſhe wanted by an additional ſubſidy, or an eaſy tax, than to pay to the monopoliſts what they had advanced, with their exorbitant profits beſides. What Elizabeth began out of policy, James continued, to ſupply his profuſion, to ſuch an extraordinary degree, as diſguſted his people, provoked his parliament, and at laſt made himſelf aſhamed, inſomuch that he revoked above twenty. And now no monopoly can be raiſed but by act of parliament, except in caſe of a new invention, and that but for a ſhort term of years †.

I come now to the *diſpenſing power*, another prerogative which the Stuarts claimed, and which coſt the laſt of them the throne. As no ſtate can ſubſiſt without mercy as well as juſtice, the king hath the power of diſtributing this mercy, and exempting a convicted criminal from the penalty of the law, but this is only where the conviction is at his ſuit; thus

† Wilſon's life and reign of James I. ap. Kennet.

thus the king can pardon a murderer convicted on an indictment in the king's name, but if he was convicted on an *appeal* by the next relation, the king cannot. The pardon belongs to the appellant. But there is a wide difference between a *pardon*, that is remiſſion of puniſhment after the fact, and *diſpenſing*, which is giving a previous licence to break the law. A general diſpenſation is, in fact, a repeal, and a particular one is a repeal *quoad hunc*, and therefore can belong only to the legiſlature. The Roman emperors, and the popes, as legiſlators, aſſumed this power, and Henry the Third, an apt pupil of his lord and maſter the pope, introduced the practice into England. In his reign a patent, with a *non obſtante* to any law whatſoever, was produced into court before Roger de Thurkeby, and this honeſt judge was aſtoniſhed at the innovation, as Matthew Paris tells us in theſe words: *Quod cum comperiſſet, ab alto ducens ſuſpicia* * *de prædictæ adjectionis appoſitione, dixit, heu, heu hos utquid dies expectavimus, ecce, jam civilis curia exemplo eccleſiaſticæ, conquinatur, & a ſulphureo fonte rivulus intoxicatur* †.

† Bibliotheca politica, dial. II. Bacon, hiſt. and political diſcourſe, part 1. chap. 64.

Here ends the firſt Volume

* Suſpiria

LEC-

LECTURE XX.

Lords of Parliament or Peers—Earls and Barons—The earlier ſtate of Baronies in England—The Barones majores & minores—Barons by writ and by letters patent—The different ranks of Nobility.

NEXT in rank to the king are the *lords*, that held immediately of him by military ſervice, as long as that ſpecies of tenure ſubſiſted; and whom, from their privilege of ſitting in Parliament in their own rights, are frequently called *Lords of Parliament*, and in common ſpeech are called *Peers*, though that word properly ſignifies any *co-vaſſals* to the ſame lord. Thus every immediate vaſſal of a baron are peers of that barony, and the accurate deſcription of the great perſonages I am ſpeaking of is *Pares Regni*. Of theſe there were, antiently, two ranks only, in England, *Earls* and *Barons*. Indeed, abroad alſo, to ſpeak properly, there were but two likewiſe: for there was no difference in power and privilege between the *dukes* and *counts*, or *earls*. But as every earl is a baron, and ſomething more, and as it is a maxim of our law, that every lord of parliament ſits there by virtue of his barony, it will, in the firſt place, be neceſſary to ſee what a baron is.

The word *baron* of itſelf, originally, did not, more than peer, ſignify an immediate vaſſal of the king; for earls palatine had their barons, that is, their immediate tenants; and, in old records, the citizens of London are ſtiled barons, and ſo are the repreſentatives of the cinque ports called to this day. Baron, therefore, at firſt ſignified only the immediate tenant of that ſuperior whoſe baron he is ſaid to be, but by length of time it became reſtrained to thoſe who properly and exactly ſpeaking, were *barones regis & regni*, and even not to all of theſe, but to ſuch only as had manors and courts therein. For though, by the principles of the feudal conſtitutions, every immediate military tenant of the crown, however ſmall his holding, was obliged to aſſiſt the king with his advice, and entitled likewiſe to give or refuſe his aſſent to any new law or ſubſidy, that is, to attend in parliament. This attendance was too heavy and burthenſome upon ſuch as had only one or two knights fees, and could not be complied with without their ruin. Hence aroſe the omiſſion of iſſuing writs to ſuch, and which, being for their eaſe, they acquieſced in, attendance in parliament being conſidered at that time as a burthen. Thus they loſt that right they were entitled to by the nature of their tenure, until the method was found out of admitting them by repreſentation. Hence aroſe the diſtinction between *tenants by barony*, and *tenants by knight ſervice in capite* of the king. The former were ſuch military tenants of the king, as had eſtates ſo conſiderable as qualified them, without inconvenience, to attend in parliament, and who were therefore entitled to be ſummoned. The *quantum* of this eſtate was regularly thirteen knights fees and one third, as that of a count or earl was twenty; that is, as a knight's fee was then reckoned at twenty pounds *per annum*, the baron's revenue was four hundred marks, or two hundred ſixty-ſix pounds thirteen ſhillings and four-pence, and the earl's

earl's four hundred pounds, anſwering in value of money at preſent to about two thouſand ſix hundred, and four thouſand pounds yearly †.

Such was the nature of all the baronies of England for about two hundred years after the conqueſt; and they are called *baronies by tenure*, becauſe the dignity and privileges were annexed to the lands they held; and if theſe were alienated with the conſent of the king (for without that they could not) the barony went over to the alienée. The manner of creating theſe barons was by inveſtiture, that is, by arraying them with a robe of ſtate, and a cap of honour, and girding on a ſword, as the ſymbols of their dignity. Of theſe Matthew Paris tells us there were two hundred and fifty in the time of Henry the Third, and while they ſtood purely on this footing, it was not in the king's power to encreaſe the number of the baronies, though of barons perhaps he might. For as William the Conqueror was obliged to gratify ſeveral of his great officers according to the number of men they brought, with two or more baronies, whenever theſe fell into the hands of the crown by eſcheat, either for want of heirs, or by forfeiture, it was in the king's power, and was his intereſt, to divide them into ſeparate hands. The ſame thing likewiſe happened, when, by an intermarriage with an heireſs more baronies than one came into the hands of a nobleman, and eſcheated to the crown ‡.

But the number of theſe feudal baronies could not, ſtrictly or properly ſpeaking, be encreaſed by the king; for

† Madox, Antiq. of the Exchequer, vol. 1. p. 197, 198. Baronia Anglica, book 1. chap. 1. Spelman, voc. Baro.

‡ Brady's introduction, in append. Baronia Anglica, p. 33.

they could be created only out of lands, and there were no lands vacant to create new ones out of, for the king's demeſnes were, in thoſe days, unalienable. However, we find, at the end of Henry the Third's reign, and even in John's, that the number of baronies were actually encreaſed, and a diſtinction made between the *barones majores*, and *minores*. The *majores* were thoſe who ſtood upon the old footing of William, and had lands ſufficient in law, namely, the number of knights fees requiſite. The *majores* were ſuch as held by part of a barony; as when an old barony deſcended to, and was divided among ſiſters; in which caſe, when the huſband of the ſiſter whom the king pleaſed to name, was the baron of parliament; or elſe were newly carved out of the old baronies that had falled in by eſcheat; as ſuppoſing the king had granted ſix knights fees of an old barony to one, to hold with all the burthens, and to do the ſervice of an entire barony, and the remaining ſeven and one third to another, on the ſame terms. But the attendance of theſe minor barons alſo, at length became too burthenſome for their circumſtances, and many of them were glad to be excuſed. The kings took then the power of paſſing by ſuch as they thought unable, by not ſending them writs of ſummons, and John extended his prerogative even to omit ſummoning ſuch of the *majores* as he imagined were inclined to oppoſe him. This however at length he was obliged to give up: For in his Magna Charta it is ſaid, *Ad habendum commune conſilium regni faciemus ſummoneri archiepiſcopos, epiſcopos, abbates, comites, & majores barones regni ſigillatim, per literas noſtras* †.

The

† Selden's titles of honour, part 2. chap. 5. Baronia Anglica, book 1. chap. 2.

The *barones majores* were then fully and plainly diſtinguiſhed from the *minores*, and I think it will not be doubted they were ſuch as had the full complement of knights fees that made up an antient barony; and, accordingly, we find in 1255, when Henry the Third had neglected ſummoning ſome of theſe, the others refuſed to enter on any buſineſs, *Quia omnes, tunc temporis, non fuerunt, juxta tenorem Magnæ Chartæ ſuæ, vocati, et ideo, ſine paribus ſuis, tunc abſentibus, nullum voluerunt tunc reſponſum dare, vel auxilium concedere vel præſtare.* No king ſince, ever omitted to ſummon all the greater nobility, until Charles the Firſt was prevailed upon to forbid the ſending a writ to the Earl of Briſtol by Buckingham, who was afraid of being accuſed by that nobleman; but on the application of the houſe of lords, and their adjourning themſelves from day to day, and doing no buſineſs, the writ at laſt was iſſued.

In the reign of Henry the Third alſo, the king's prerogative of ſummoning or omitting the leſſer barons was likewiſe aſcertained by an act of parliament ſince loſt, as we find by theſe words from hiſtory: *Ille enim rex (ſcilicit Henricus Tertius) poſt magnas perturbationes, & enormes vexationes inter ipſum regem, Simonem de Monteforti, & alios barones, motas & ſopitas, ſtatuit & ordinavit, quod omnes illi comites & barones regni Angliæ, quibus ipſe rex dignatus eſt brevia ſummonitionis dirigere, venirent ad parlamentum ſuum; & non alii niſi, forte, dominus rex alia brevia illis dirigere voluiſſet* †. And from henceforth no nobleman could ſit in parliament without a writ. But there was this difference between the greater and the leſſer barons, that the former had a right to their writ *ex debito juſtitiæ*, to the latter it was a matter of favour; but when ſummoned, they, being really

† Camden, Britan. p. 122,

really barons, had the ſame rights with the reſt, though ſitting, not by any inherent title, but by virtue of the writ. The other leſſer barons, who were generally omitted to be ſummoned, by degrees mixed with the other kings tenants in capite, and were thenceforth repreſented by the knights of the ſhires †.

But theſe baronies by tenure being long ſince worn out among the laity, it is proper to proceed to the two ways now in being of creating peers, by *writ*, and by *letters patent*. It is the lord Coke's opinion, and in this he has been followed ever ſince, that a writ to any man, baron, or no baron, to ſit in parliament, if once he hath taken his ſeat in purſuance thereof, gains a barony to him and the heirs of his body. And though the law, principally on the authority of that great lawyer, is now ſo ſettled, certainly it is comparatively but a novel opinion, and very ill to be ſupported by reaſon. The words of the writ are, *Rex tali ſalutem, quia de adviſamento & aſſenſu concilii noſtri, pro quibuſdam arduis & urgentibus negotiis ſtatum & defenſionem regni noſtri Angliæ contingentibus, quoddam parlamentum noſtrum apud Weſtmonaſt. tali die, talis menſis, proximo futuro teneri ordinavimus, & ibidem vobiſcum, ac cum prelatis magnatibus & proceribus dicti regni noſtri, colloquium habere & tractatum; vobis in fide & ligeantia quibus nobis tenemini, firmiter injungendo mandamus, quod conſideratis dictorum negotiorum auctoritate & periculis imminentibus, ceſſante excuſatione quacunque, dictis die & loco perſonaliter interſitis nobiſcum, ac cum prelatis magnatibus & proceribus ſuper dictis negotiis tractaturi, veſtrumque conſilium impenſuri, & hoc ſicut nos, & honorem noſtrum, ac expeditionem negotiorum prædictorum diligitis, nullatenus omittatis* ‡.

That

† Selden, tit. Honour, part 2. chap. 5. § 21.

‡ Baronia Anglica, book 2. chap. 1. Selden's tit. Hon. part 2. chap. 5. § 22.

That this writ muſt be obeyed, there is no doubt, for every ſubject is, by his allegiance, obliged to aſſiſt the king with faithful counſel: But what right the party ſummoned acquired thereby is the queſtion. The words are not only perſonal to him, but reſtricted likewiſe to a particular place and time; and accordingly, in antient times, we find many perſons ſummoned to one parliament, omitted in the next, and ſummoned perhaps to the third. There is not a word therein that hints at giving the leaſt right to an heir; and what reaſon can be aſſigned why a man, by this writ, ſhould gain an eſtate of inheritance in a peerage, when, in letters patent, it is admitted that he gains only an eſtate for life, without the word *heirs*. That antiently there was no ſuch notion appears from the ſummons to parliament, where frequently we find the grandfather ſummoned, the father paſſed by, and the grandſon afterwards ſummoned: Nay, in the rolls there are inſtances of ninety-eight perſons being ſummoned a ſingle time only, and neither themſelves, nor any of their poſterity, ever taken notice of afterwards. Or, if we were to allow that this writ created an inheritance, what reaſon can be given why it ſhould be an eſtate tail only, and be confined to the heirs of the body, and not, as all other new inheritances, created generally, go to the collateral heirs?

But in order to diſcover plainly what privileges perſons ſo called by writ, had, or could obtain in thoſe times, it will be proper to diſtinguiſh them into three kinds of perſons. Firſt, then, they were either ſome of the *minores barones by tenure*; and theſe, when called, had certainly all the privileges of the greater; or elſe they were not barons at all, but plain knights or gentlemen; and, with reſpect to theſe, it is plain they had a right to deliberate,

debate,

debate, and adviſe. But the better opinion is, they had no right to vote, but were aſſiſtants and adviſers only, as the judges are at preſent; for it is abſurd to ſuppoſe that, in thoſe times, when the commons were low, and inconſiderable, and the barons were more powerful than the crown, theſe latter ſhould ſuffer their reſolutions to be over-ruled at the pleaſure of the king, by his calling in ſuch numbers as we find he often did, which muſt have been the caſe, if all he ſummoned had votes. But theſe two kinds of perſons gained by their writ, or ſitting in conſequence of it, originally, no farther right than to be preſent at that time. However, by many of theſe perſons and their heirs having been conſtantly ſummoned, eſpecially ſince Henry the Seventh's reign, and the ancient practice of omitting any who had been very frequently ſo, going into diſuſe, the diſtinction between the greater and the leſſer barons was forgot, and that opinion prevailed which my lord Coke had adopted, and which is now the law, that a man, having once ſat in parliament in purſuance of the king's writ, acquires thereby an eſtate tail to him and the heirs of his body †.

There were yet another kind of perſons, not peers, that might be ſummoned by writ. Theſe were the eldeſt ſons of peers, to whom the father's barony muſt deſcend; and in ſuch caſe, if the heir was called by the name of a barony that was in his father, he was a baron to all intents and purpoſes. But it ſeems very plain, that this was not a new creation of a barony; for in that caſe the ſon ſo called ſhould have been the loweſt peer, whereas the practice is the contrary. The eldeſt ſon of the duke of Norfolk, called

† Coke on Littleton, lib. 2. chap. 8. § 149. Baronia Anglica, p. 164. et ſeq.

called by the title of lord Mowbray, ſat firſt baron, becauſe that barony of his father's is the antienteſt in England. It ſeems, therefore, that this was conſidered as a transfer of the antient barony by the joint conſent of the father and king, and the father ſtill continues to ſit by the remaining peerage in him. Accordingly we find no inſtance of a baron's ſon ſitting on ſuch a ſummons, unleſs the father had another barony by which he might ſit. If the father indeed had a higher title, that has been reckoned ſufficient to ſupport his ſeat, though his only barony was transferred to the ſon. This then being no new creation, but a temporary transfer only of an old peerage, it ſhould ſeem, that this title, when once merged in the greater by the father's death, ſhould go according to the old limitation; but of late we find them conſidered as new creations. On the death of the late earl of Derby, Sir Edward Stanley, his ſixth couſin, ſucceeded, and ſits in parliament as baron Strange, by Henry the Seventh's creation; but an elder ſon of a former earl of Derby, having been called by writ while his father was living, the Duke of Athol, as his heir by the female line, ſits by the ſame title of baron Strange of king Charles the Firſt's creation.

The deſcent of theſe two kinds of baronies are directed by the rules of the deſcent of other inheritances at common law, and conſequently females are capable of ſucceſſion, but with two exceptions; firſt, that half blood is no impediment, and conſequently the half brother excludes the ſiſter; ſecondly, that the honour is not diviſible, and therefore, if there be two or more ſiſters, heireſſes, the title is *in abeyance*, that is, is ſuſpended, until the king makes choice of one of them and her heirs; though by conſtant

uſage

uſage the law ſeems to be verging faſt to a conſtant deſcent to the eldeſt †.

The third method of creating peers is by *letters patent*, which is the moſt uſual, and eſteemed the moſt advantageous way; becauſe a peerage is thereby created, though the new nobleman hath never taken his ſeat, which is not the caſe of a barony by writ. As to the manner of theſe creations, there was a notable difference intervened ſince the acceſſion of Henry the Seventh from what was the practice before Richard the Second. In his eleventh year began this method of creating by patent, in favour of John de Beauchamp, who, though ſummoned, never ſat there, but was attainted by the next parliament, and afterwards executed. But, the attainder out of the caſe, his patent in law could never have been deemed valid, becauſe Michael de la Pole was the lord chancellor who affixed the ſeal to it, which had been before taken from him by act of parliament, and he declared incapable of ever having it again. This, then, was a ſingle and ineffectual attempt of that weak prince to create a new peer without the aſſent of parliament, which was the uſual way, above thirty having been made ſo in that very reign. His ſucceſſors were too wiſe to follow this example; for every barony newly created, till the union of the roſes, which were about fourteen, were, every one of them, as appears on the face of the patents, by authority of parliament, if we except two or three; and even theſe, on a cloſe examination, will appear not to be new baronies, but *regrants* of old feudal baronies

† Coke on Littleton, p. 166. St. Amand on the legiſlative power of England, p. 103.

baronies by tenure, which, undoubtedly, were all in the ſole diſpoſition of the king †.

But Henry the Seventh, having trodden down all oppoſition, was fortunate enough to carry the point Richard had vainly attempted, and acquired for his ſucceſſors that prerogative which they have ſince enjoyed, of creating peers at pleaſure. The deſcent of theſe titles, created by patent, is directed by the words of the creation. If heirs are not mentioned, it is only an eſtate for life; if to a man and heirs of his body, females are not excluded, but the general way is, to the heirs male of the body of the grantée, perhaps, with remainders over, and they deſcend as other eſtates entailed. The caſe of the dutchy of Somerſet was ſingular. Edward Seymour having ſons by two venters, was created duke of Somerſet, and his heirs male of his ſecond marriage, remainder to his heirs male by his firſt. This title continued near two hundred years in the younger branch, until, upon its failure in the late duke of Somerſet, Sir Edward Seymour, the preſent duke, the heir by the prior marriage, ſucceeded by virtue of the remainder.

In the caſe of lord Purbeck, in Charles the Second's reign, it was controverted whether a title could be extinguiſhed, for as lord Purbeck had ſurrendered his honour by fine to the king, and there it was determined, and ſo the law now ſtands, contrary to many precedents that were produced, that the title is inherent in the blood, and while that remains uncorrupted, can by no means be extinguiſhed by ſurrender or otherwiſe, and this, generally, whether the peerage be created by patent or by writ; for Purbeck's was by writ. In caſe of a patent where the dignity is expreſsly entailed,

† Selden, tit. Hon. part 2. chap. 5. § 27. and 28.

entailed, it is ſurely as reaſonable that it ſhould be impoſſible for the poſſeſſor to deſtroy the entail, as in an eſtate tail of land, created by the king, and yet in old times there had been many inſtances to the contrary. I ſhall mention but two that happened in this kingdom.

Sir Thomas Butler was created baron Cahir by Henry the Eighth to his heirs general. His heirs male failed in his ſon Edmond, the ſecond baron, and his nephew, Sir Theobald, was, in 1683, by queen Elizabeth created baron Cahir; but it being found that Sir Thomas left daughters, to one of whom the title ought to have been aſſigned by the queen, one of them, and the heir of the other, who was dead in 1685, bargained, ſold, and releaſed to Sir Theobald and his aſſigns, their right and title to the ſaid honour. The other was the caſe of the honour of Kingſale. Charles the Firſt, apprehending the barony of Kingſale to be extinguiſhed by attainder, created Sir Dominick Sarsfield viſcount Kingſale, but, upon lord Kingſale's petition, and proof made by him that his barony ſtill ſubſiſted, it was ordered that Sarsfield ſhould ſurrender his viſcounty of Kingſale, and be created viſcount of Kilmallock, with his former precedence, which was accordingly done.

Theſe two inſtances were, indeed, of a particular nature, and calculated to rectify grants that had ariſen from error; but in England there were, in ancient times, many inſtances of ſuch ſurrenders without error. They were, indeed, generally made in order to obtain higher titles; and therefore it is no wonder they paſſed *ſub ſilentio*, and were never diſputed. But as to the old baronies by tenure that were annexed to land, nothing is clearer than that, by the king's conſent

conſent, they might be aliened or ſurrendered, notable inſtances of which happened in the reign of Henry the Third. Andrew Giffard, baron of Pomfret, ſurrendered to the king; and Simon de Montfort, a nobleman of large poſſeſſions in France, had two ſons by the heireſs of the earldom of Leiceſter, in whoſe right he was earl of Leiceſter, and, having a mind to ſettle his ſecond ſon in England, aſſigned the earldom over to him, as Selden ſays; or, which comes to the ſame thing (for the eldeſt ſon was equally defeated) ſurrendered it to the king, who granted it to the ſecond, according to Camden.

All noblemen are equally ſo, and, therefore, each others peers; but they differ in rank and precedence. The ranks are five; *dukes*, *marquiſſes*, *earls*, *viſcounts*, *barons*. The firſt duke was created by Edward the Third; the firſt marquiſs, by Richard II.; the firſt viſcount, by Henry the Sixth. Though their dignities are now perſonal, and annexed to the blood, yet as they were originally annexed to land, ſo much of the old form remains, that, in their creation, they muſt be named from ſome place in ſome county; though I do not apprehend it to be material at this day, whether there really be ſuch a place or not. With reſpect to the raiſing a lord from a lower degree of dignity to a higher, I ſhould obſerve, that long before Henry the Seventh's time, the king had the right ſolely in himſelf, though it was frequently done in parliament; for this was not adding to the number of the peers, but an exertion of the ancient prerogative of his ſettling precedence according to his pleaſure. This continued in England till Henry the Eighth, by act of parliament, ſettled it according to antiency, and it ſtill continues in Ireland, though it has not been exerted ſince Henry the Seventh's time,

time, when lord Kingſale, a Yorkiſt, was obliged to change places with lord Athenry, a Lancaſtrian, and from firſt became the ſecond baron, which hath continued his rank, till lately, that Athenry was created an earl †.

† Camden's Introd. to his Britan. p. 234. et ſeq. Baronia Anglica. Selden, tit. hon. part 2. chap. 5. § 29. 30. 31.

LEC-

LECTURE XXI.

Earls or Counts as diſtinguiſhed from Barons—The office of Counts—Their condition after the conqueſt—Counties Palatine in England—Counties Palatine in Ireland—Spiritual Peers—The trials of Noblemen.

IN my laſt lecture I treated of baronies, which are the loweſt rank of peerage, and of the right whereby this claſs of nobles ſits in the great council of the nation, and alſo of the various methods that have prevailed in different ages of creating them; but before I have done with the higher nobility, it will be neceſſary to ſay ſomething of *earls* or *counts* as diſtinguiſhed from barons; for they differ from them, not only in having a greater number of knights fees, and conſequently having a greater revenue, but in poſſeſſing alſo a more extenſive juriſdiction. The inſtitution of *counts*, I obſerved in a former lecture, wherein I treated of the progreſs of the feudal law, was not, originally, a part of the feudal policy. They were, indeed, always choſen out of the king's companions, who reſided in his houſe, and were therefore called *comites*, but they were not ſet to preſide over Germans, who were the conquerors, but over ſuch of the old inhabitants, Romans or Gauls, who by a voluntary ſubmiſſion had retained their freedom, and who in every reſpect, except bearing a ſhare in the legiſlature or government, were on an equal footing with the conquerors †.

The

† Selden, tit. hon. part 2. ch. 1.

The office of theſe counts was threefold, to judge theſe freemen in peace, to conduct them in war, to manage the king's demeſnes in their reſpective diſtricts, and to account with him for them and the profits of his courts of juſtice; which were very conſiderable when all offences were puniſhed by fines. At the beginning they were temporary officers, but they ſoon became fixed for life, and at length, towards the latter end of the ſecond, and in the beginning of the third race in France, they got, through the weakneſs of the crown, eſtates in fee in their counties; and either by grants of the kings, or by uſurpation, converted the profits they before accounted for to the crown, for their own uſe, and held their courts in their own name. In ſhort, they became petty ſovereigns, paying only homage, and the uſual ſervices of ward, marriage, and relief to their ſupreme lord; and as ſuch they coined money, levied war againſt their neighbours, nay frequently againſt the king himſelf; until Lewis the Eleventh found the means of humbling them, and brought the crown out of tutelage, as the French expreſs it *.

The preſent ſtate of Germany is an exact repreſentation of what the French and the other continental monarchies were in thoſe days, except that the kings had large countries, and multitudes of vaſſals immediately ſubject to them; whereas the emperor hath now none. But in England theſe lords, tho' very powerful, never aſcended to ſuch a pinnacle of grandeur. Their firſt conſtitution here we muſt refer to the time of the diviſion of England into counties, to which they had a reference, which is generally aſcribed to Alfred. Their power and office was exactly the ſame with the counts on the continent in thoſe early times, namely,

* Du Bos, hiſt. critique de L'établiſſement de la monarchie Francoiſe, tom. 3. 497, &c. Maſcou's hiſt. of the ancient Germans, b. 16. § 36.

namely, to judge and lead the freemen to war. For the greateſt part of the lands of England were at that time allodial, as is proved, by Spelman, contrary to the opinion of Sir Edward Coke; although, with him, it muſt be allowed, that there were fiefs alſo before the Conqueſt, and that they were not all introduced at that period. Till that time their office was only for life, and they were known by various names, as *duces*, *comites*, and *conſules* in Latin, *ealdermen* in Saxon, and *earls* in the Daniſh tongue †.

But William, having turned all the lands into feudal, was obliged to put his earls on the ſame footing, that thoſe on the continent were in his time, and conſequently to make them hereditary. However he and his ſucceſſors were careful not to give them ſuch extenſive powers and revenues as they had abroad. The county courts were held in the king's name, neither were the earls allowed the whole profits of them, two-thirds of them being reſerved to the king; and in appearance to eaſe them, who were often obliged to attend in council or in war, but in reality to prevent the king's being defrauded, and to prevent the too great influence which their judging in perſon might acquire to them in their diſtricts, officers choſen by the people, and approved by the king, were ſubſtituted to adminiſter juſtice under the names of *vice comites*, or ſheriffs; theſe were to pay to the king the two-thirds, and to the earl his third of the profits, which was in thoſe times looked upon as ſo incident to an earldom, as to paſs with it, although expreſs words were wanting; ſo that in thoſe times an earl and a county were correlatives ‡.

† Spelman's treatiſe of Feuds and Tenures.

‡ Selden, tit. hon. part 2. ch. 5.

Each earl took his title from ſome one county, and the number of the one could not exceed that of the other. King John, however, altered their nature in ſome meaſure, and his example has been followed in depriving the earl of the thirds of the county profits; for he created Henry de Bohun earl of Hereford, and granted to him twenty pounds yearly, to be received out of the third penny of the county in lieu thereof. But it is plain that the juſtice and ſucceſs of this invention was doubted of at firſt, for John took a collateral ſecurity from the earl, that he ſhould never in his earldom claim any more than the twenty pounds expreſsly granted him. Theſe ſums, ſo granted, are called *creation money*, and were formerly expreſsly granted out of the third penny of the county; but of late have been made payable at the Exchequer. Such was the nature of the ancient earldoms that were by tenure, and had reference to counties. The modern ones, that are merely honorary, and go with the blood, were firſt made in parliament. Afterwards the king was allowed, by his ſole authority, to advance a baron to a higher rank; for that was not adding to the number of the peers; but the creation of a bare gentleman a peer at once hath only been practiſed ſince the acceſſion of Henry the Seventh †.

Before I quit this head of earldoms, it will be proper to ſay ſomewhat about *counties palatine* which had extraordinary privileges, like unto the counties and duchies abroad. The firſt was that of Cheſter, erected by the Conqueror, in favour of his nephew Hugh Lupus, in theſe words: *Totumque hunc comitatum tenendum ſibi & hæredibus, ita libere ad gladium, ſicut ipſe rex tenet Angliam ad coronam.* The effect of this creation was to have *jura regalia*; for the earl palatine

† Selden, tit. hon. part 2. ch. 5. § 10.

palatine might pardon treaſon, murder, and other offences, might make juſtices of aſſize, gaol delivery, and of the peace; might create barons of his county palatine, and confer knighthood. They had likewiſe all forfeitures, that aroſe by the common law, or by any prior ſtatute; but forfeitures ariſing from ſtatute, made after the erection of the county palatine, belonged to the king. They had courts as the king had at Weſtminſter, and out of their chancery iſſued all writs, original and judicial. Neither did the king's writs run within the county palatine, except writs of error, which were in the nature of appeals, or in caſes where, otherwiſe, there would be a failure of juſtice. All manner of indictments and proceſſes were made in the name, and every treſpaſs was laid to be done againſt the peace of him that had the county palatine. But theſe and ſome other privileges have been taken away, and annexed to the crown, in whoſe name they muſt now be; but the *teſte* of the writs is ſtill in the name of the earl palatine †.

Of theſe counties palatine there are now in England four, Lancaſter united to the crown, Cheſter to the principality of Wales; Durham and Ely, each belonging to the biſhop of the place; but the privileges of theſe two are going faſt into diſuſe. But in this kingdom, (Ireland) for the encouragement of adventurers, the whole country, as faſt as it could be reduced, was erected into palatinates, and very little, except the cities, retained in the king's hand. The making ſo many great lords, who had frequent quarrels with each other, and that at ſuch a diſtance from the ſeat of government, was one great occaſion of the ſlowneſs of the ſettlement of the kingdom. For, to ſtrengthen themſelves, ſuch of them as reſided here attached the natives to

† Baronia Anglica, p. 150, et ſeq. Selden, tit. hon. part 2. chap. 5 § 8. Bacon, hiſt. and polit. diſcourſe on the laws of England, part 1. chap, 29.

them, and taught them the uſe of arms, and others that dwelt in England entirely neglected to ſend hither any defence, ſo that, by the end of Edward the Third's time, the Iriſh had repoſſeſſed themſelves of almoſt the whole kingdom, if we except five or ſix counties; whereas in John's reign they held not above half, and that under homage and tribute, either to the king, or the lords, who had grants from him.

I ſhall give a ſhort detail of theſe palatinates, and an account of the manner of their diſtinguiſhment. The preſent county of Galway, under the name of the county of Connaught, was a palatinate in the De Burghs; as was Ulſter, firſt in De Courcy, then in De Lacy; and theſe two were united by De Burgh's marriage with Lacy's daughter, and afterwards deſcended to Lionel of Clarence's daughter, who married the earl of March, and, in the perſon of Edward the Fourth, merged in the crown. In the ſame prince, likewiſe, merged that of Meath, which, being in another branch of the Lacy's, was divided into the eaſtern and weſtern between two daughters. The former came by deſcent to the houſe of March, and ſo to Edward the Fourth. Strongbow had the grant of Leinſter as a Palatinate, which at length was divided into five diſtinct ones between his grand-daughters, who being married to Engliſh noblemen, took no care for the defence of the country, their titles, eſtates, and Jura Regalia were taken from them by act of parliament, under Henry the Eighth.

Kildare, being in the hands of the earl of that name, eſcaped for a little time, until he was attainted under the ſame king, where it ended; for though his heir was reſtored to the title and eſtate by queen Mary, it was with an expreſs

expreſs exception of the palatinate. The kingdom of Cork, containing that county and the ſouth of Kerry, was another palatinate, granted to Fitz Stephen and Cogan, who made partition between them; and on Fitz Stephen's death without iſſue, his part eſcheated to the crown. Cogan's ſhare ſhould have gone to the Courcey's and Carens, but they could never obtain the poſſeſſion of it; for the earl of Deſmond got the eſtate by purchaſe from a Cogan who pretended a right, and held it; ſo this ſhare of the palatinate fell likewiſe into diſuſe. Deſmond, indeed, had intereſt enough to get a new palatinate created for himſelf in the county of Kerry, called Deſmond, which for repeated rebellions was juſtly forfeited to queen Elizabeth.

Edward the Third erected the palatinate of Tipperary in favour of the earl of Ormond, who was grandſon to Edward the Firſt, which continued in that family, with ſome interruptions, until the attainder of the late duke in 1715. Thus by degrees the crown regained the power it had parted with, and was at length enabled, though with difficulty, to reduce the whole kingdom, which had been well nigh loſt by means of ſuch profuſe grants.

Beſides the temporal peers, there are ſpiritual ones, that is the biſhops, and they have ſeats in parliament, which antiently many abbots alſo enjoyed. The original of this right was from the feudal cuſtoms. The prieſts of the Germans, while they continued pagans, were neceſſary attendants in their general aſſemblies, not only for advice, but the benefit of their prayers and divinations. When theſe nations embraced Chriſtianity, they transferred the ſame veneration and honor to their new inſtructors and biſhops; and ſometimes other churchmen of eminence, though they held lands not by military tenure, but by what

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is called *free alms*, were, in every nation as well as England, members of the ſtates of parliaments. But ſince the conqueſt they have begun to ſit by another right, namely by their baronies; the conqueror having converted their eſtates in free alms into baronies, and to their great mortification, ſubjected them to military ſervice *.

Upon this head ſeveral queſtions have been propounded, as how far they are lords of parliament, and whether the clergy are a third eſtate of the realm, and ſit ſolely in that right. This is a queſtion of ſome importance, becauſe if they make a diſtinct eſtate, no law would be good to which the majority of them did not conſent. Certain it is that in France, the clergy made one eſtate, the nobility the ſecond, the burghers the third; and in Sweden the peaſants make the fourth, all ſitting in diſtinct houſes, the majority of each of which muſt concur. And therefore I do believe, that when, in England, we talk of *three eſtates*, the clergy, not the biſhops alone, make one of them, contrary to the modern opinion, that the king is the firſt eſtate, and the biſhops and the nobility the ſecond; for the king is in no country reckoned one of the eſtates, but the head of all. However from this no argument can be drawn that the biſhops ſhould ſit ſeparately, or that a majority of them, as repreſenting the clergy, ſhould concur.

As to ſitting ſeparately, it is pretty clear that, by the old law, none were members of parliament, but the immediate military tenants of the king, and that they ſat all in one houſe, however their titles and fortune might differ; being all equal as to rank, with reſpect to the king, and all having the ſame right. The diviſion of parliament into two

* Coke on Littleton, lib. 2. § 135. Selden, tit. hon. part 2. ch. 5. § 19.

two houſes was never known in Scotland, who, in all probability, modelled their conſtitution from their neighbours; nor doth it appear in England previous to Edward the Firſt, but aroſe, probably, from the great barons diſdaining to ſit, as equals with citizens and burgeſſes. For even, after this time, they did not diſdain to aſſociate with the knights of the ſhires, who repreſented the minor barons, and other military tenants, as appears by many inſtances. But for a number of centuries paſt the gentry, which were formerly conſidered as a lower nobleſſe, and are ſo abroad, have been melted into one body with the other commoners †.

If then there was originally but one houſe, and if, ſince the diviſion, the biſhops have conſtantly ſat in the houſe of peers, there can be no pretence for any privilege for them more than for the body of barons or earls. It is urged, likewiſe, that ſeveral valid acts of parliament were paſſed without any biſhop preſent; but this happened only in diſtracted times; and, whoever might think it prudent or proper to abſent themſelves at a particular ſeaſon, it will hardly be ſaid to be a good parliament when they were not ſummoned; and if, at any time, they refuſed to attend, there was no reaſon why the public buſineſs ſhould ſtop, as they ſat, not as an independent conſtituent part of parliament, but each diſtinctly for himſelf, in right of his barony. From theſe occaſional and general abſences of theirs, an opinion grew up by degrees, and now is eſtabliſhed law, that there is a material difference between biſhops and lay lords, in reſpect to their nobility. In truth, that they are not peers to each other, and conſequently that a biſhop cannot

† Robertſon's hiſt. of Scotland, book 1. p. 68. Eſſays on Brit. Antiq. Eſſ. 2.

cannot ſit in judgment on the life of a peer, neither is he to be tried by the peers, but by a jury of commoners.

It is worth while to ſee how theſe opinions grew up; for, from the original conſtitution, every biſhop, being a baron by tenure, and having a fee ſimple therein, had certainly as great right as other barons; but the canon law having forbid any eccleſiaſtics being concerned in matters of blood, and they being obliged by the common law to attend judgments in parliament, were in a great ſtreight between the two laws, how to act when a peer was capitally accuſed. They at length obtained from Henry the Second in the conſtitutions of Clarendon, the following allowance: *Et ſicut cæteri barones debent intereſſe judiciis curiæ, regis quouſque perveniatur ad diminutionem membrorum, vel ad mortem;* where the laſt words are plainly an exception in their favour, in derogation to the common law, on account of their peculiar circumſtances under the canon. However, as many queſtions might ariſe before it came to the laſt vote, that might intirely influence the final determination, they uſed to abſent themſelves totally, and this going on for ages, and the feudal baronies wearing out, and all titles becoming fixed to the blood, not to the land, they came to be conſidered as peers of a different nature, becauſe their blood did not ſucceed, and that which was firſt a favourable permiſſion, was conſtrued a prohibition; and when this was once eſtabliſhed, it followed neceſſarily, that, not being peers to the nobility by blood, they muſt be tried by commoners ‡.

With reſpect to the trials of noblemen, now I have ſaid ſo much on that head, I ſhall obſerve, they were carried on in two different methods Either the accuſed perſon was

‡ Gibſon, cod. jur. eccleſ. Angl. vol. 1. p. 143.

was tried in parliament, and then all the temporal lords had voices, or he was tried by a jury of peers; that is the king appointed twenty-four noblemen for that purpoſe: A law that has proved fatal to many noblemen, who happened to fall under the diſpleaſure of the court. A commoner hath a right to prevent the ſheriff's returning a jury to try him, if he can ſhew a juſt exception to the ſheriff; and after the return is made, he can challenge a certain number for cauſes known only to himſelf, and as many more as he can prove ſufficient matter of exception to. Such care did the law take of the lives of the commons, but no exception lay for a peer to the king's return. The law would not ſuppoſe the leaſt partiality in him, even in his own cauſe; neither would it ſuſpect that a peer could be biaſſed by any conſideration from doing ſtrict juſtice, and therefore no challenge lay againſt him for any cauſe, however ſtrong and notorious; and the ſame confidence is the reaſon why they give their votes, guilty or not guilty, not upon their oaths, but upon their honours.

I can ſcarce imagine that this method of trial could have prevailed in the times of the great power of the barons, when they often made the crown to totter; neither have I been able to diſcover its beginning. Certain it is that, in the reigns of the Plantagenets moſt, if not all noblemen, were tried in full parliament; and as certain it is, that, during the reigns of the Tudors and Stuarts, the other was univerſally followed; inſomuch that every nobleman was ſure either to ſuffer or eſcape, according as the court was at that time affected towards him. At length, after many ſtruggles, about 1695, the bill for regulating trials for high treaſon and miſpriſion of treaſon was paſſed; one clauſe of which provides, that on the trial of peers, every lord who hath a right to vote in parliament, ſhall be ſummoned,

and

and have a right to vote. Thus was the inconvenience attending the king's naming the jury remedied; but the law in the other point ſtands as before, that no peer can be challenged. According to this law have all trials of Iriſh peers proceeded ſince that time, though there is no act for that purpoſe in this kingdom ‡.

‡ Privileges of the Baronage, by Selden, ch. 2. p. 1537 of the edition of his works by Wilkins. Coke's inſtitute, ſecond part, p. 49. and 50; third part, p. 26.—31.

LECTURE XXII.

The ſhare of the Commons in the Legiſlature—The Armigeri or Gentry—Knights Bannerets—The nature of Knighthood altered in the reign of James I.—Knights Baronets—Citizens and Burghers—The advancement of the power and reputation of the Commons.

HAVING given a general idea of the lords, and their ſhare of the legiſlature, it will now be proper to deſcend, and ſee the ſeveral claſſes of the lower rank, called *Commons*, and to examine what ſhare or influence they had formerly, or now enjoy, in the government. The commoners may, in general, then, be divided into the *leſſer nobility* or *gentry*, and the others, whom, for diſtinction ſake, I ſhall call the *lower commons*. For although, ſince the reign of Henry the Eighth, many men of the beſt families, and ſome deſcended from the nobility, have engaged in commerce, and thereby brought luſtre to that order of men, before that time all perſons engaged in trade were held in as much contempt by the gentry of England, as they are at preſent, by thoſe of any nation; and a gentleman who employed himſelf in hunting, or perhaps ſerving the king, or ſome great lord, was looked upon to have degraded himſelf.

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The gentry were called *Armigeri*, becauſe they fought on horſeback, in compleat armour, covered from head to foot; whereas the infantry's defenſive arms were of a ſlighter kind, and no compleat covering. But we are not to imagine that all who fought on horſeback compleatly armed, were gentry; for, in order to compleat their ſquadrons, men of the lower ranks, who, by their ſtrength of body, and military ſkill, were capable of ſervice, were admitted, but this did not make them gentlemen. Hence, in our old hiſtories, we find the *knights and eſquires*, that is, the real gentry, carefully diſtinguiſhed from the *men at arms*. The peculiar privilege of the gentry was the bearing on their ſhields certain marks, to diſtinguiſh them from each other, and the men at arms called *Coats of Arms*. At firſt they were perſonal privileges, and not inherent in the blood, and the marks and rewards of ſome perſonal act of bravery performed by the bearer; ſo we find in the romances, that a new knight was to wear plain white, until, by ſome exploit, he merited a mark. The general opinion is, that they were firſt introduced at the time of the cruſades, which I believe is pretty juſt, at leaſt with reſpect to our country: for the imperial crown of England had no arms before the conqueſt. The Norman kings bore the arms of Normandy, *two leopards paſſant*, to which Richard the Firſt added that of Guienne, another leopard paſſant, and ſo compoſed this Engliſh coat, in which, among other alterations, the leopards have ſince been changed to lions †.

For the further encouragement of valour, theſe marks became tranſmiſſible to heirs, not to the eldeſt ſon only, as lands, but to all the ſons; ſaving that the younger were to take

† Spelman, voc. Armiger. Du Cange, voc. Armigeri.

take ſome addition, for diſtinction ſake. While theſe coats were granted by the king alone, and that for real ſervice done, and conſequently were not too common; and while the cuſtom of wearing compleat armour remained, and the office of high conſtable (the judge in ſuch matters) continued, the gentry were very curious in preſerving theſe diſtinctions, and vindicating them from uſurpation. But as the military diſpoſition of our gentry hath greatly ſubſided ſince the loſs of the provinces in France, and the kings at arms have aſſumed the power of giving coats, nicety in theſe reſpects hath long ſince expired; and now, as in a commercial country, eſpecially, it ſhould be, education and behaviour are ſufficient criterions of a gentleman.

I ſhall therefore ſay no more of them, as diſtinguiſhed from the reſt of the commonalty, but obſerve, that of theſe there are two ranks, *knights* and *eſquires*, or gentlemen. For though we now make a diſtinction between theſe two laſt, the old law knew none, nor is it now a miſnomer, in a writ of pleadings, to ſtile an eſquire a gentleman, or the contrary. The holding of a knight's fee did not make a man of that order, but there were particular ceremonies required for the purpoſe. For the original deſign of the inſtitution of *dubbing knights*, was that, after a perſon had, by performing military exerciſes, ſhewn that he had properly accompliſhed himſelf, and was capable of that honourable ſervice in the field, in his proper perſon, he ſhould, by a public ſolemnity, be openly declared ſo. No wonder, then, that the higheſt nobility, the ſons of kings, nay kings themſelves, thought this title an addition to their dignity, as it was then an infallible proof, that they had not degenerated from the virtue of their anceſtors †.

But

† Selden, tit. hon. part 2. ch. 5. § 33. Camden's introd. to his Britan. 242.

But among knights there were ſome of a more diſtinguiſhed kind (I do not mean to ſpeak of particular orders, ſuch as thoſe of the garter and others) called *Bannerets*, as knights in general were made, upon their proving themſelves by exerciſes capable of ſervice. Theſe were never made but for an actual exploit in war, and then were dubbed with great ſolemnity under the royal banner. Their diſtinction was bearing a little banner, annexed to the wooden part of their lance, adjoining the iron point; as, originally, every man who had a whole knight's fee, or the amount thereof in parts of fees, was obliged to ſerve in perſon, and was not allowed a proxy, but in caſes of neceſſity every ſuch perſon was obliged to appear upon the king's ſummons, to ſhew himſelf qualified, and to receive the order of knighthood. This power continued in the king, even after the military tenants were diſcharged of perſonal attendance on ſending another, or paying eſcuage, and came to be conſidered as a profitable fruit of the king's ſeignory, and was frequently uſed as an expedient to raiſe money, by obliging the unqualified, or thoſe who had no mind to the expence or fatigue of attending, to compound †.

This right of compoſition was eſtabliſhed by act of parliament, the firſt of Edward the Second, which likewiſe fixes the eſtate the perſons ſummoned muſt have at twenty pounds a year, the quantity of a knight's fee; twenty pounds a year was indeed the valuation of a knight's fee at the time of the conqueſt, but by change of times, in Edward the Second's reign, it may well be eſteemed forty; ſo that by this act a man who had half a knight's fee was liable to be ſummoned. This was one of the happy means made uſe of by king Charles the Firſt to procure money when

† Selden, tit. hon. part 2. ch. 5. § 39.

when he quarrel led with his parliament. He was ſenſible, indeed, of a difference in the value of money, and therefore ſummoned none but ſuch as had forty pounds a-year; but had he paid due attention to its real riſe, he ſhould have ſummoned none under an hundred and twenty. For in Edward's reign a pound in money was a real pound in ſilver, whereas in Charles's, it was but a third part, and ſo the proportion was to ſixty pound ſterling, and ſixty more is the leaſt riſe that can be allowed for the improvements in the value of lands, by the intermediate increaſe of commerce. No wonder, therefore, that his people looked upon it as an unſupportable grievance. Accordingly, in the 17th of his reign, the act of Edward the ſecond was repealed, and in Ireland, it vaniſhed with the tenures on which it depended †.

The great change in the nature of knighthood happened in the reign of James the Firſt. The Plantagenets never created any perſons ſuch but with a view to military merit, except their judges. The Tudors extended it to perſons who had ſerved them well in civil ſtations, but ſo ſparingly, and to perſons of ſuch evident merit, that it ſtill was an encouragement to thoſe that deſerved well of the public. But James, who had a paſſion for creating honours, poured forth his knighthoods, without regard to deſert, with ſo laviſh an hand, conferring them for money frequently on wealthy traders, and others without any apparent public merit, that thereby, as alſo by creating an order of hereditary knights, called *baronets*, a knighthood ſoon loſt the badge of merit it before had carried.

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† Spelm. reliq. diſſert. de milite. Coke's inſt. part 2. p. 593.

The occaſion of creating baronets was this. On the eſcheat of the ſix counties in Ulſter, they were planted with colonies of Scotch and Engliſh; and as it was neceſſary to ſupport a ſtanding army there, for ſome years after, for the defence of the infant ſettlements, and money was wanting for that purpoſe, as, in that reign, it always was for every other, this ſcheme of creating an order of hereditary knights, to take place after the barons, was fixed upon for that purpoſe. At firſt it had ſome aſpect towards military ſervice, for each of them was obliged to maintain ſo many ſoldiers in the plantation, for a limited time; and to make the honour more valuable, and to get the better terms for it in the firſt plan, it was provided, that no more than two hundred ſhould be originally created; and when any of them failed, no new ones to be created in their room. But it was ſoon ſeen that theſe new knights, when they had once attained their dignities, might not duly perform the ſervices they engaged for. The maintaining the ſoldiers, therefore, was commuted into a ſum paid to the king, who undertook to do it; and had he been a good œconomiſt, it would have been a prudent precaution, but whatever ſums he could lay his hands on were always at the mercy of his reigning favourite. He was, therefore, obliged to depart from his intended limitation, and to exceed his number; and yet, after all, the ſervice was not done ſo well as it ſhould have been. His ſucceſſors have followed his example, in adding to the number, which now is certainly unlimited †.

Next to the gentry, or military order, in eſtimation among the northern nations ſtood the *citizens* and *burghers*, that

† Selden, tit. hon. part 2. ch. 5. § 46. Cotton's poſthumous works.

that is, the trading part of the nation, whether merchants or artificers. Theſe were for ſome ages held in a very low light, none of the conquerors or their deſcendants applying themſelves to ſuch occupations. They were, indeed, at firſt allowed certain privileges and enjoyed their own laws, under the inſpection of magiſtrates appointed by the king, known by the name of *Præpoſiti*, *Provoſts*, or ſome other equivalent title. But theſe liberties did not laſt long. The turbulent temper of the times, the frequent competitions for the throne, and the many rebellions of the great lords, occaſioned the towns and their inhabitants to be taken in war, one after another; and the perſons ſo taken, were, by the prevailing *Jus Gentium* of theſe ages reduced to ſervitude; not, however to a condition ſo low as the *villeins*, who were, properly, the ſlaves of thoſe people, and had no property but at the will of their lords. However it is, no ſtate, except one abſolutely barbarous, could ſubſiſt without artizans; and as commerce is the parent of wealth, and as neither it, nor arts, could thrive where property is not, in ſome ſort, ſecure, the lords were in ſome degree, by their own intereſt, obliged to relinquiſh to theſe people the ſeizing of their goods at pleaſure, as they practiſed towards their villeins, and to leave them at liberty to make regulations among themſelves for the benefit of trade †.

Thus far, then, they were free, but their ſervitude conſiſted in their being liable to taxes, or *tailliages*, at the will of the lords, who, if they were wiſe, laid on ſuch only as they could well bear; but miſerable was their condition when they fell into the hands of one who was needy and rapacious; for, then, they were often fleeced, even to ruin and depopulation. This induced the wiſer lords,

† Madox, Firma Burgi, ch. 1.

who ſaw the conſequences, and how much the arbitrary exertion of ſuch powers muſt, in the end, hurt themſelves, to reſtrain their own powers; and, by degrees, by granting them *charters*, to emancipate them. They formed them into *bodies corporate*, confirmed the right of making *bye-laws*, which had been permitted them, and granted them other privileges, or *franchiſes*, as they called them, from their being infranchiſed, in derogation to former regal or ſeignoral rights. But for their total freedom they were indebted to parliament, which, ſeeing the bad uſe king John made of his right in this kind, provided thus in Magna Charta, *Civitas London habeat omnes libertates ſuas antiquas, & conſuetudines ſuas. Præterea volumus & concedimus, quod omnes aliæ civitates, burgi, & villæ, & barones de quinque portubus, & omnes alii portus, habeant omnes libertates & liberas conſuetudines ſuas.* And another chapter reſtrains the king from laying new and evil tolls, and confines him to the antient cuſtoms †.

Hitherto, however, the citizens and burgeſſes were no part of the body politic, and were not repreſented in parliament. But as, with their ſecurity, their wealth and conſequence encreaſed, about, or before the year 1300, they were admitted to that privilege; that they might, in conjunction with the knights of ſhires, be a check on the overgrown power of the mighty lords; and about that time alſo the ſame privilege was allowed to this claſs of people in the other nations of Europe alſo. This right was confirmed, and ſo I may ſay, the *houſe of commons*, in its preſent condition, formed by the ſtatute of the thirty-fourth of Edward the Firſt. *Nullum tallagium vel auxilium, per nos vel*

† Madox, Firma Burgi, ch. 2. Ruffhead, vol. 1. p. 4.

vel heredes noſtros, in regno noſtro ponatur, ſeu levetur, ſine voluntate & aſſenſu archiepiſcoporum, epiſcoporum, comitum, baronum, militum, burgenſium, & aliorum liberorum communium de regno noſtro; where we ſee, not only the burgeſſes, but free yeomen alſo had repreſentatives, namely, by their voting along with the knights of the ſhires, according to the maxim of that wiſe prince, *Qua ad omnes pertinent, ab omnibus debent tractari* *.

Having come to the conſtitution of the houſe of commons as it ſtands at preſent, it will not be amiſs to look back, and ſee how far its preſent form agrees with, or differs from the feudal principles. Theſe principles, we have ſeen, were principles of liberty; but not of liberty to the whole nation, nor even to the conquerors; I mean, as to the point I am now upon, of having a ſhare in the legiſlation. That was reſerved to the military tenants, and to ſuch of them only as held immediately of the king. And the loweſt and pooreſt of theſe alſo, finding it too burthenſome to attend theſe parliaments, or aſſemblies, that were held ſo frequently, ſoon, by diſuſe, loſt their privileges; ſo that the whole legiſlature centered in the king, and his rich immediate tenants, of his barony. And it is no wonder the times were tempeſtuous, when there was no mediator, to balance between two ſo great contending powers, and were it not that the clergy, who, though ſitting as barons, were in ſome degree a ſeparate body, and had a peculiar intereſt of their own, performed that office, ſometimes, by throwing themſelves into the lighter ſcale, the government muſt ſoon have ended either in a deſpotical monarchy, or tyrannical oligarchy.

* Ruffhead, vol. 1. p. 156.

Such were the general aſſemblies abroad in the feudal countries, but ſuch were not ſtrictly the *wittenagemots* of the Saxons, for their conſtitution was not exactly feudal. I have obſerved that the moſt of their lands were allodial, and very little held by tenure. The reaſon I take to be this: On their ſettlement in Britain they extirpated, or drove out, the old inhabitants, and therefore, being in no danger from them, they were under no neceſſity of forming a conſtitution compleatly military. But then thoſe allodial proprietors being equally freemen, and equal adventurers with theſe who had lands given them by tenure, if any in truth had ſuch, they could not be deprived of their old German rights, of ſitting in the public aſſemblies. From the old hiſtorians, who call theſe meetings *infinita multitudo*, it appears that they ſat in perſon, not by repreſentation †.

This conſtitution, however, vaniſhed with the conqueſt, when all the lands became feudal, and none but the immediate military tenants were admitted. We find, indeed, in the fourth year of William the Firſt, twelve men ſummoned from every county, and Sir Matthew Hale will have this to be as effectual a parliament as any in England ‡; but, with deference to ſo great an authority, I apprehend that theſe were not members of the legiſlature, but only aſſiſtants to that body. For if they were part thereof, how came they afterwards to be diſcontinued till Henry the Third's time, where we firſt find any account of the commons? The truth ſeems to be, that they were ſummoned on a particular occaſion, and for a purpoſe that none but they could anſwer. On his coronation he had ſworn to govern

† Gurdon's hiſtory of Parliament. Tyrrel's introduction to his hiſtory. L. L. Anglo Saxon, ap. Wilkins.

‡ Hiſtory of the common law of England, p. 107.

vern by Edward the Confeſſor's laws, which had been ſome of them reduced into writing, but the greater part were the immemorial cuſtom of the realm; and he having diſtributed his confiſcations, which were almoſt the whole of England, into his followers' hands, who were foreigners, and ſtrangers to what theſe laws and cuſtoms were, it was neceſſary to have them aſcertained; and, for this purpoſe, he ſummoned theſe twelve Saxons from every county, to inform him and his lords what the antient laws were. And that they were not legiſlators, I think appears from this, that when William wanted to revive the Daniſh laws, which had been aboliſhed by the Confeſſor, as coming nearer to his own Norman laws, they prevailed againſt him, not by refuſing their conſent, but by tears and prayers, and adjurations, by the ſoul of Edward his benefactor.

Thus William's laws were no other than the Confeſſor's, except that by one new one, he dexterouſly, by general words, unperceived by the Engliſh, becauſe couched in terms of the foreign feudal law, turned all the allodial lands, which had remained unforfeited in the proprietor's hands, into military tenures. From that time, until the latter end of Henry the Third's reign, our parliaments bore the exact face of thoſe on the continent in that age; but then, in order to do ſome juſtice to the leſſer barons, and the lower military tenants, who were entitled by the principles of the conſtitution to be preſent, but diſabled by indigence to be ſo in perſon, they were allowed to appear by repreſentation, as were the boroughs about the ſame time, or ſoon after. The perſons entitled to vote in theſe elections for knights of the ſhire, were, in my apprehenſion, only the minor barons, and tenants by knight ſervice, for they were the only perſons that had been omitted,

ted, and had a right before, or perhaps with them, the king's immediate ſocage tenants *in capite*.

But certain it is, the law that ſettled this had ſoon, with regard to liberty, a great and favourable extenſion by which all freemen, whether holding of the king mediately or immediately, by military tenure or otherwiſe, were admitted equally to vote; and none were excluded from that privilege, except villeins, copy-holders, and tenants in antient demeſne. That ſo great a deviation from the feudal principles of government happened in ſo ſhort a time, can only be accounted for by conjecture. For records, or hiſtory, do not inform us. I ſhall gueſs then, that the great barons, who, at the end of Henry the Third's reign, had been ſubject to forfeiture, and obliged to ſubmit, and accept of mercy, were duly ſenſible of the deſign the king had in introducing this new body of legiſlators, and ſenſible that it was aimed againſt them, could not oppoſe it. But, however, they attempted, and for ſome time ſucceeded to elude the effects of it, by inſiſting that all freemen, whether they held of the king, or of any other lord, ſhould be equally admitted to the right of the repreſentation.

The king, whoſe profeſſion was to be a patron of liberty, Edward the Firſt, could not oppoſe this; and as he was a prince of great wiſdom and foreſight, I think it is not irrational to ſuppoſe, that he might be pleaſed to ſee even the vaſſals of his lords, act in ſome ſort independently of them and look immediately to the king their lord's lord. The effect was certainly this, by the power and influence their great fortunes gave them in the country, the majority of the commons were, for a long time, more in the dominion of

of the lords than of the crown; though, if the king was either a wiſe or a good prince, they were even then a conſiderable check upon the too mighty peers.

Every day, and by inſenſible ſteps, their houſe advanced in reputation and privileges and power; but ſince Henry the Seventh's time, the progreſs has been very great. The encreaſe of commerce gave the commons ability to purchaſe; the extravagance of the lords gave them an inclination, the laws of that king gave them a power to alienate their intailed eſtates; inſomuch that, as the ſhare of property which the commons have is ſo diſproportionate to that of the king and nobles, and that power is ſaid to follow property, the opinion of many is, that, in our preſent ſituation, our government leans too much to the popular ſide; while others, though they admit it is ſo in appearance, reflecting what a number of the houſe of commons are returned by indigent boroughs, who are wholly in the power of a few great men, think the weight of the government is rather oligarchical †.

† Biblioth, polit. dial. 6, 7, 8, Hume, vol. 1.

LECTURE XXIII.

The privilege of voting for Knights of the Shire—The buſineſs of the different branches of the Legiſlature, diſtinct and ſeparate—The method of paſſing laws—The hiſtory and form of the legiſlature in Ireland.

THE houſe of commons growing daily in conſequence, and the ſocage tenants having got the ſame privilege of voting for the knights of the ſhire as the military ones, it naturally followed, that every free perſon was ambitious of tendering his vote, and thereby of claiming a ſhare in the legiſlature of his country. The number of perſons, many of them indigent, reſorting to ſuch elections, introduced many inconveniences, which are taken notice of, and remedied by the ſtatute of the eighth of Henry the ſixth chapter the ſeventh which recites, that of late "elections of knights had been made by very great, "outrageous, and exceſſive numbers of people of which "the moſt part was of people of ſmall ſubſtance, and of no "value, whereof every one of them pretended a voice "equivalent with the moſt worthy knights and eſquires, "whereby manſlaughter, riots, batteries, and diviſions "among the gentlemen and other people of the ſame coun-"ties ſhall very likely riſe and be, unleſs convenient and "due remedy be provided in this behalf;" and then it provides that, "no perſons ſhould have votes, but ſuch as "have lands or tenements to the value of forty ſhillings a "year above all charges." And ſo the law ſtands at this day,

day, though by the change in the value of money, by the ſpirit of this ſtatute, no perſon ſhould have a vote that could not diſpend ten pounds a year at leaſt. Such a regulation, were it now to be made, would, certainly, be of great advantage both to the repreſenters and repreſented; but there is little proſpect of its ever taking place: And if it ſhould be propoſed, it would be looked upon as an innovation, though in truth, it would be only returning to the original principles of the conſtitution †.

Our legiſlature, then, conſiſting of three diſtinct parts, the king, lords, and commons, in proceſs of time, each of them grew up to have diſtinct privileges, as to the beginning particular buſineſſes. Thus all acts of general grace and pardon take their riſe from the king; acts relative to the lords and matters of dignity, in that houſe; and the granting of money in the commons. How the commons came by this excluſive right, as to money matters, is not ſo eaſy to determine. Certain it is that, originally, the lords frequently taxed themſelves, as did the commons the commonalty, without any communication with each other; but afterwards, when it was judged better to lay on general taxes, that ſhould equally affect the whole nation, theſe generally took their riſe in that houſe which repreſented the bulk of the people; and this, by ſteadineſs and perſeverance, they have arrogated ſo far into a right peculiar to themſelves, as not to allow the lords a power to change the leaſt title in a money bill. As to laws that relate not to theſe peculiar privileges, they now take their riſe indifferently either in the lords or commons, and when framed into a bill, and approved by both, are preſented to the king for

† Ruffhead, vol. I. p. 544.

for his aſſent; and this has been the practice for theſe two or three hundred years paſt *.

But the ancient method of paſſing laws was different, and was not only more reſpectful to, but left more power in the crown. The houſe which thought a new law expedient, drew up a petition to the king, ſetting forth the miſchief, and praying that it might be redreſſed by ſuch or ſuch a remedy. When both houſes had agreed to the petition, it was entered on the parliament-roll, and preſented to the king, who gave ſuch anſwer as he thought proper, either conſenting in the whole, by ſaying, *let it be as is deſired*, or accepting part and refuſing or paſſing by the reſt, or refuſing the whole by ſaying, *let the ancient laws be obſerved*, or in a gentler tone, *the king will deliberate*. And after his anſwer was entered on the roll, the judges met, and on conſideration of the petition and anſwer, drew up the act, which was ſent to be proclaimed in the ſeveral counties †.

Lord Coke very juſtly obſerves that theſe acts drawn up by men, maſters of the law, were generally exceedingly well penned, ſhort, and pithy, ſtriking at the root of the grievance, and introducing no new ones; whereas the long and ill penned ſtatutes of later days, drawn up in the houſes, have given occaſion to multitudes of doubts and ſuits, and often, in ſtopping one hole, opened two. However, notwithſtanding this inconvenience, there was good cauſe for the alteration of method. The judges, if at the devotion of the court, would ſometimes, make the moſt beneficial laws eluſory, by inſerting a ſalvo to the prerogative,

* Spelman, voc. Parlamentum. Hales on Parliaments. Ellys on Temporal Liberty.

† Elſringe, on the method of paſſing bills in Parliament. Gurdon's hiſt. of Parliament.

tive, though there was none in the king's anſwer; whereas, by following the preſent courſe, the ſubjects have reduced the king to his bare affirmative or negative, and he has loſt that privilege, by the diſuſe of petitions, of accepting that part which was beneficial to himſelf, and denying the remainder *.

I have the rather mentioned this ancient practice of making laws, becauſe it ſhews how inconſiſtent with our conſtitution is that republican notion, which was broached by the enemies of Charles the Firſt, that the king by his coronation oath, ſwearing to obſerve the laws *quas vulgus elegerit*, was obliged to paſs all bills preſented to him, and had no negative. The meaning, certainly, only extended to his obſervation of the laws in being. For if the words were to be conſtrued of future propoſitions, and in the ſenſe that thoſe people would put upon them, the lords alſo, as well as the king, muſt be deprived of their power of diſſent, and ſo indeed, it appears, they expounded it; for when the lords offended them, by refuſing the trial of the king, they conſiſtently enough with the maxim they had eſtabliſhed, turned them out of doors.

But though ſuch as I have mentioned is the conſtitution of the Engliſh parliament, the form of the legiſlature in this kingdom hath been for above two hundred and ſixty years very different, the nature of which, and the cauſes of its deviation from its model, it is proper every gentleman of this country ſhould be acquainted with. In the infancy of the Engliſh government in Ireland, the chief governors were generally choſen by the king out of the lords of the pale,

* Ruffhead's preface to the ſtatutes.

pale, the deſcendants of the firſt conquerors, both as they were better acquainted with the intereſt, and more concerned in the preſervation of the colony, and alſo as, by their great poſſeſſions, they were better enabled to ſupport the dignity of the place, whoſe appointments, the king's revenue here being inconſiderable, were very low. Theſe governors, however, though men of the greateſt abilities, and of equal faithfulneſs to the crown, were not able to preſerve the footing the Engliſh had got ſoon after the conqueſt; but were every day loſing ground to the natives, down to the reign of Edward the Third, which is generally, and, I believe, juſtly, attributed to the negligence of the Engliſh lords, who, by intermarriages, had acquired great eſtates in Ireland. The power of theſe lord lieutenants was, in one reſpect, likewiſe exorbitant, namely, in giving conſent to laws without ever conſulting his majeſty, a power, perhaps, neceſſary at firſt, when the country was in a perpetual ſtate of war, and its intereſt would not brook delays, but certainly, both for the ſake of king and people, not fit to be continued.

It was natural, therefore, for the king, who found himſelf ill ſerved, to change hands, and to entruſt this exorbitant power with perſons not eſtated in the country, and whoſe attachment he could confide in; and accordingly, from that time, we find natives of England generally appointed to the government, to the great diſcontent of the Iriſh lords, who looked upon themſelves as injured by the antient practice not being continued. This diſcontent was farther inflamed by a very extraordinary ſtep, which this otherwiſe wiſe and juſt king was prevailed upon to take, and which firſt gave riſe to that famous diſtinction between the Engliſh by blood, and the Engliſh by birth. This king, and his father Edward the Second, had granted great eſtates,

eſtates, and extenſive juriſdictions to many Iriſh lords of Engliſh blood, for ſervices pretended to have been done, many of which, it is probable enough, as the king alledged, were obtained by deceit and falſe repreſentation; and had he contented himſelf with proceeding in a legal courſe, by calling theſe patents in by *ſcire facias*, and vacating them upon proof of the deceit, no perſon could have complained; but he took a very different method, as appears from the writ he thought proper to iſſue on that occaſion. *Quia plures exceſſivæ donationes terrarum, tenementorum & libertatum, in terra Hiberniæ, ad minus veracem & ſubdolam ſuggeſtionem petentium, tam par Edward II. quam per regem nunc factæ ſunt, rex deluſorias hujuſmodi machinationcs volens elidere, de concilio peritorum ſibi aſſiſtentium, omnes donationes terrarum, tenementorum, & libertatum prædictarum duxit revocandas, quouſque de meritis perſonarum, de cauſis & conditionibus donationum prædictarum fuerit informatus, & ideo, mandatum eſt juſticiariis regni Hiberniæ, quod omnia terras tenementa & libertates predicta per dictos regis juſticiarios aut locum tenentes ſuos quibuſcunque perſonis facto ſcire facias.* This haſty ſtep alienated the Engliſh Iriſh from the king and his adviſers, and though, after a conteſt of eleven years, the king annulled this preſumption, the jealouſy continued on both ſides, and the Iriſh of Engliſh blood, were too ready to follow the banners of any pretender to the crown of England.

In the reign of Henry the Sixth, that weak prince's miniſters, jealous of the influence of Richard duke of York in England, and of his pretenſions to the crown, conſtituted him governor of Ireland; than which they could not have done a thing more fatal to their maſter's family, or to the conſtitution of this kingdom, as it turned out in the ſequel; for to induce him to accept it ſo eager were they

to

to remove him from England, they armed him almoſt with regal powers * He was made lieutenant for ten years, had all the revenue, without account, beſides an annual allowance from England; had power to farm the king's lands, to place and diſplace officers, and levy ſoldiers at his pleaſure. The uſe the duke made of his commiſſion was to ſtrengthen his party, and make Ireland an aſylum for ſuch of them as ſhould be oppreſſed in England; and for this purpoſe paſſed an act of parliament, reciting a preſcription, that any perſon, for any cauſe, coming into the ſaid land, had uſed to receive ſuccour, tuition, ſupportation, and free liberty within the ſaid land, during their abiding there, without any grievance, hurt, or moleſtation of any perſon, notwithſtanding any writ, privy ſeal, great ſeal, letters miſſive under ſignet, or other commandment of the king, confirming the ſaid preſcription, and making it high treaſon in any perſon who ſhould bring in ſuch writs, and ſo forth, to attach or diſturb any ſuch perſon.

This act, together with the duke's popularity, and the great eſtate he had in this kingdom, attached the Engliſh Iriſh firmly to his family, inſomuch that, in Henry the Seventh's reign, they crowned the impoſtor Lambert Simnel, and were afterwards ready to join Perkin Warbeck; and by this act of the duke of York's they thought to exculpate themſelves †. But when that king had trodden down all oppoſition, he took advantage of the precarious ſituation they were in, not only to have that act repealed, and to deprive his repreſentatives there from paſſing laws *rege inconſulto*, but alſo to make ſuch a change in the legiſlature, as would throw the principal weight into his and

† Kennet's Engliſh Hiſtorians, vol. 2. p. 587, 606. Carte, vol. 2. p. 828. Hume, vol. 2. and 3.

and his ſucceſſors hands; and this was by the famous law of Poyning's *. By former laws a parliament was to be holden once a year, and the lords and commons, as in England, were the propoſers. This act, intended to alter theſe points, gave occaſion to many doubts; and indeed, it ſeems calculated for the purpoſe of not diſcloſing its whole effect at once. Its principal purport, at firſt view, ſeeming to be intended to reſtrain the calling the parliament, except on ſuch occaſions as the lord lieutenant and council ſhould ſee ſome good cauſes for it, that ſhould be approved by the king. The words are, that "from "the next parliament that ſhall be holden by the "king's commandment and licenſe, no parliament be "holden hereafter in the ſaid land, but at ſuch ſeaſon as "the king's lieutenant and council there firſt do certify "the king, under the great ſeal of that land, the cauſes "and conſiderations; and all ſuch acts as to them ſeemeth "ſhould paſs in the ſame parliament, and ſuch cauſes, "conſiderations, and acts, affirmed by the king and his "council to be good and expedient for that land, and his "licenſe thereupon, as well in affirmation of the ſaid cauſes "and acts, as to ſummon the ſaid parliament under his "great ſeal of England had and obtained; that done, a "parliament to be had and holden after the form and ef-"fect before rehearſed, and any parliament holden contra-"ry to be deemed void †."

The firſt and great effect of this act was, that it repealed the law for annual parliaments, and made the lord lieutenant and council, or the king who had the naming of them, with his council of England, the propoſer to the two houſes of the laws to paſs, at leaſt of thoſe that ſhould be ſo deviſed

* Lord Bacon's life of Henry VII. ap. Kennet, vol. 2. p. 612,

† Iriſh ſtatutes, vol. 1. p. 23. Coke, 4. inſtit. chap. 76.

viſed before the meeting of parliament. But the great doubt was, as there were no expreſs words depriving the lords and commons of their former rights, whether, when the parliament was once met, they had not ſtill the old right of beginning other bills, or whether they were not reſtrained to the acts ſo certified and returned. By the preambles of ſome acts, ſoon after made, expreſſing that they were made at the prayer of the commons in the preſent parliament aſſembled, one would be inclined to think that the commons, after the aſſembling the parliament, had propoſed theſe laws. Certain it is, the latter opinion, ſupported by the miniſters of the king and his lawyers, gained ground. For, in the twenty-eighth of Henry the Eighth's reign, an act was made ſuſpending Poyning's law with reſpect to all acts already paſſed, or to be paſſed in that parliament; the paſſing of which act was certainly a ſtrong confirmation of what was before doubtful againſt the houſe of lords or commons in Ireland, whether they could bring in bills different from thoſe tranſmitted by the council, ſince here they both conſented to the ſuſpenſion of the act, to make valid the laws they had paſſed or ſhould paſs in that parliament, without that previous ceremony ‡.

But in the reign of Philip and Mary, by which time this opinion, before doubtful (for ſo it is mentioned in the act then made) was, however, to be maintained, and ſtrengthened, as it added power to the crown. The act we at preſent live under was made to prevent all doubts in the former, which was certainly framed in words calculated to create ſuch doubts, to be extended in favour of the prerogative. This provides, that as many cauſes and conſiderations

‡ Iriſh Statutes, p. 48.

rations for acts not foreſeen before, may happen during the ſitting of parliament, the lord lieutenant and council may certify them, and they ſhould paſs, if they ſhould be agreed to by the lords and commons. But the great ſtrokes in this new act were two, the firſt explanatory of part of the former in Henry the Seventh's reign, that is, that the king and council of England ſhould have power to alter the acts tranſmitted by the council of Ireland; ſecondly, the enacting part, that no acts but ſuch as ſo came over, under the great ſeal of England, ſhould be enacted; which made it clear, that neither lords or commons in Ireland had a right to frame or propoſe bills to the crown, but that they muſt firſt be framed in the privy council of Ireland, afterwards conſented to, or altered by the king, and the ſame council in England, and then appearing in the face of bills, be refuſed or accepted *in toto* by the lords and commons here †.

It is true, that both lords and commons have attempted, and gained an approach towards their antient rights of beginning bills, not in that name, but under the name of *Heads of Bills*, to be tranſmitted by the council; but as the council are the firſt beginners of acts of parliament, they have aſſumed a power of modelling theſe alſo. The legiſlature of Ireland is, therefore, very complicated. Firſt, the privy council of Ireland, who, though they may take the hint from the lords or commons, frame the bill, next the king and council of England, who have a power of alteration, and really make it a bill, unalterable, by ſending it under the great ſeal of England; then the two houſes of lords and commons, who muſt agree in the whole, or reject the whole; and, if it paſſes all theſe, it is preſented to the king for his aſſent; which indeed is but nominal, as it was before obtained.

† Iriſh Statutes vol. I. p. 143.

LECTURE XXIV.

Villenage—The Servi in Germany, mentioned by Cæſar and Tacitus, the predeceſſors of the Socmen or ſocage tenants in the feudal monarchy—Villeins in groſs and villeins belonging to the land of the Lord—The condition of villeins—The different ways by which a man may become a villein—The means by which villenage or its effects may be ſuſpended.

I Now proceed to the loweſt claſs of people that were in a feudal kingdom, who, indeed, were not any part at all of the body politick, namely *copyhold tenants*, *tenants in ancient demeſne*, and *villeins*, on which I ſhall not much enlarge as villenage is worn out both in England and Ireland; and though the two former are common in England, yet there are none ſuch in this kingdom. I ſhall begin with *villenage*, though the loweſt kind, as I apprehend the other two by the tacit conſent of their lords, have for ages, from being villeins acquired the privileges that diſtinguiſhed them from ſuch.

In a former lecture I gave it as my opinion, that, while the nations of the north continued in Germany, there was no ſuch order of men among them; but that the perſons among thoſe people who were called *ſervi* by Cæſar and Tacitus, were the predeceſſors of the *ſocmen* or *ſocage tenants* in

in the feudal monarchy; though they certainly had not all the privileges the ſocmen acquired, and that after their ſettlements in their conqueſts, this rank was introduced, and formed out of their captives taken in war, in imitation of the Roman ſlaves. In this I am ſtrongly ſupported by my lord Coke, who quotes Bracton, Fleta, and the Mirror, concerning their origin, to the following purpoſe: "The "condition of villeins who paſſed from freedom into bon-"dage in ancient time grew by the conſtitution of nations, "and not by law of nature; in which time all things were "common to all, and by multiplication of people, and "making proper and private thoſe things that were com-"mon, aroſe battles. And then it was ordained by conſti-"tution of nations (he means by the tacit conſent of civi-"lized nations) that none ſhould kill another, but that he "that was taken in battle ſhould remain bond to his taker "for ever, and he to do with him, and all that ſhould "come of him, his will and pleaſure, as with his beaſt or "any other cattle, to give, or to ſell, or to kill. And af-"ter, it was ordained for the cruelty of ſome lords, that "none ſhould kill them, and that the life and members of "them, as well as of freemen, were in the hands and pro-"tection of kings, and that he that killed his villein ſhould "have the ſame judgment as if he had killed a freeman †." This, it falls alſo to be obſerved, is the very account the Roman civil law gives of the original of ſervitude.

Villenage, therefore, was a ſtate of ſervitude, erected for the purpoſe of doing the moſt ignoble, laborious, and ſervile offices to the lord, according to his will and pleaſure, whenſoever called upon; ſuch as the inſtances *Littleton*

 gives,

† Coke on Littleton, lib. 2. ch. 11. § 172.

gives, of carrying and recarrying dung, and ſpreading it on his lord's land. *Bracton* thus defines it, *purum villenagium eſt, a quo preſtatur ſervitium incertum indeterminatum, ubi ſcire non poterit veſpere quale ſervitium, fieri debet mane*, viz. *Ubi quis facere tenetur quicquid ei præceptum fuerit.* So the moſt honourable ſervice, the military one, was free, and its duties uncertain. The next in rank, the ſocage was free, and its duties certain. This, the loweſt, was ſervile, and its duties uncertain †.

Of thoſe villeins there were two kinds, villeins belonging to the perſon of the lord and his heirs, which our law calls *villeins in groſs*, and *villeins belonging to the lands of the lord*, and who, in conſequence of the lands being aliened, went over to the new acquirer, without any ſpecial grant. Theſe were in the Roman law, called, *ſervi adſcriptitii glebæ*, that is, ſlaves annexed to the ſoil, and by our lawyers *villeins* regardant to a manor; for manors were, antiently, thus diſtributed. After the lord had reſerved to himſelf a demeſne contiguous to his caſtle, ſufficient for the purpoſe of his houſe and his cattle, the remainder was generally divided into four parts; the firſt for ſettling ſuch a number of military tenants as might always more than ſuffice to do the ſervice due to the ſuperior lord; the ſecond for ſocage tenants, to plow the lord's demeſne, or, in lieu thereof, to render corn, cattle, or other things as ſtipulated by him; the third for villeins, for the purpoſe of carrying dung, felling timber, making incloſures, and other ſervile offices, as required by the lord at his pleaſure; and the laſt ſhare of land, was called the *waſte* or *common*, being generally woodland,

† Bracton, lib. 4. cap. 28.

land, and coarſe paſture, the wood for the lord's hunting, for ſupplying him with timber at his pleaſure, and the tenants with reaſonable *eſtovers* as they are called, out of the woods, in thoſe three articles, *houſebote* for the ſupport of their houſes, *ſloughbote*, for their utenſils of huſbandry, and *firebote*, for fewel; and the paſture for the cattle of all the tenants, military, ſocage, and villeins in common. This was the uſual method of diſtribution, not however into equal parts, for the demeſne and waſte were generally much the largeſt, nor always into the ſame number of parts, for this varied according to the quantity and quality of the land, whether better or worſe, and the military ſervice reſerved, whether lighter or heavier *.

From this diſtribution we may ſee that, in moſt manors, there was land which, having been originally ſet apart to the uſe of the villeins, was called villein-land, which retained its name, and was liable to the ſame name, and ſervile ſervices, though it had come into the hands of freemen, who, conſequently, though free, might hold lands in villenage, and be obliged to do the ſame uncertain ſervices as a villein was. Few freemen however, we may ſuppoſe, would ſubmit to ſuch uncertain burthens, and therefore when they took ſuch lands, the lord generally reduced the ſervice to a certainty, and this tenure, becauſe of the low nature of the duties they performed, was alſo, though abuſively, called *villenage*. But ſpeaking with propriety, it was ſocage, the tenant being a freeman, and the ſervices certain. Certainty of ſervice being, as I have often mentioned, the grand characteriſtic that diſtinguiſhed the ſocage tenure from the military above it, and from villenage below it.

Let

* Reliq. Spelm. 251. Barington on the ſtatutes 270. et ſeq. Gurdon's hiſt. of Court-Baron and Court-Leet, p. 573.

ſloughbote

Let us now ſee what kind of property this rank of people had in their perſons, their lands and their chattles; for from what has been already obſerved, ſome kind of property they muſt have had, or they could not have performed the ſervices. And the firſt rule is, that, with reſpect to every perſon but his lord alone, a villein was perfectly a freeman. His life, his liberty, his property, were equally protected by the law, as thoſe of any other perſon. He could acquire, he could alien property, he could be plaintiff in all kinds of actions whatſoever; but if defendant he might plead his being a villein. As to his lord, his caſe was very different. His life, indeed, his liberty, his limbs, were under the protection of the king; and if in theſe he was injured by his lord, the lord ſhould be puniſhed at the ſuit of the king, as in the caſe of any other ſubject, but not at his own ſuit. However, there were two excepted caſes, where the law (for they moſt certainly puniſhed the two deteſtable crimes of murder and rape) gave a villein actions againſt the lord, namely an *appeal*, that is an accuſation in his own name of murder, where the lord had killed the villein's anceſtor; and appeal of rape, where the lord had raviſhed his *neif*, for ſo a bond woman, or female villein, or *nief*, is called in our law. And here if the lord was found guilty, the villein, or *nief*, were by that judgment manumized for ever. For it would have been a glaring abſurdity, to have afterward truſted them in the power of the heir of that lord, whom they had hanged. Neither had a villein, with reſpect to his daughter, the ſame power of diſpoſing her in marriage without the lord's conſent as he had of his ſon. And this diſtinction was founded upon ſolid reaſon, for the ſon of a villein, after his marriage, and his iſſue, continued in the ſame plight as he was in before, villeins to the lord; but the daughter, by her marriage,

riage, paſſed into another family, and her iſſue were either to be freemen, if her huſband was free, or villeins to the other lord, if her huſband was ſuch; ſo that the lord had a very important intereſt in his ſeeing his villein's daughter married to another villein of his. This previous conſent, however, wore out by degrees, and by the cuſtom of particular places, a certain fine was all that the lord could claim for the marriage.

With reſpect to the lands the villein held from his lord, and alſo as to his chattels, or perſonal fortune, he was only tenant, or poſſeſſor at the will of the lord; for he the lord might reſume the one, or take poſſeſſion of the other whenever he pleaſed; but in the interim they were the villeins, and he might convert the profits of them to his own uſe, unleſs they were alſo in being and ſeized; the ſeizure of them being what made the abſolute property in the lord. And the caſe was the ſame with reſpect to purchaſes, or acquiſitions of lands or goods; for before the ſeizure, or ſome other public act equivalent thereto, the villein might alien them as well as the goods he had held before at the will of the lord, and the alienation was good againſt the lord, and the reaſon of this was undeniable. For it would have put a total ſtop to all commerce both of goods and land, if every buyer was obliged, at his peril, to make enquiry, and to take notice whether the ſeller may not poſſibly, in truth, be a villein to ſome one of the many lords in the kingdom; and it would have been highly abſurd to allow the lord to ſeize the lands, or goods in the hands of the purchaſer, when he might ſeize the purchaſe money likewiſe in the hands of his villein, the ſeller; I ſay it is the ſeizure, or ſome other public act equivalent thereto, that veſts the property

in

in the lord; for, in all caſes, an actual ſeizure was not poſſible. A few inſtances will clear this up †.

If the villein purchaſes lands in poſſeſſion in fee ſimple, fee tail, life, or years, the lord ſhould, if he had a mind to make them his, enter, and claim them; or if, for fear of danger, he dare not enter, ſhould come as nigh to the lands as he dare, and claim them there. And this was ſufficient to veſt the eſtate in the lord, according to the nature of the eſtate the villein had in it, and to defeat a future purchaſer; even though the lord ſhould ſuffer the villein to continue in the poſſeſſion. For the purchaſer is obliged, at his peril, to take notice of all legal acts of notoriety, done reſpecting the lands he purchaſes. But if the villein purchaſes land not in poſſeſſion, as ſuppoſe a remainder, or reverſion, where there is a prior eſtate for life or lives, or in tail, in another perſon in being; there the lord cannot enter, for that would be diſſeizing, and doing wrong to the immediate tenant of the freehold; and if he waited till that eſtate was ſpent, and the remainder or reverſion was to come into poſſeſſion, the villein might have aliened them before, and ſo defeated his lord. He ſhould, therefore, in ſuch caſe, come to the land, and claim the reverſion or remainder, as his villein's purchaſe. And this act preſently is ſufficient to veſt them, the reverſion or remainder in him, and to defeat a future purchaſer. So if a villein purchaſed an advowſon, or preſentation to a living, where the parſon of the church is living, the lord cannot preſent, which is the proper act to gain poſſeſſion of the advowſon. For the church is full of an incumbent, but he ſhall

† Coke on Littleton, lib. 2. chap. 11.

ſhall come to the church, and claim the advowſon as his villein's purchaſe; and this veſts the advowſon in him, and will defeat a future alienation by his villein. In the ſame way with reſpect to goods; the lord may either ſeize them, and retain them in his own hands, or may come to the place where they are, and openly claim them before the neighbours, and ſeize a part of them in the name of the whole goods his villein *hath*; and this ſhall veſt the property in him, though he leaves the poſſeſſion ſtill in his villein; and if he adds the words or *may have*, it veſts the property of goods after acquired, though it is otherwiſe of lands.

From this power of the lord as to his villein's property, it appears the villein can bring no action relative to property againſt him; for all ſuch actions, being either to recover the thing itſelf, or damages for the wrong done, in both caſes, it would be uſeleſs, and improper. For, inaſmuch as the lord had right to take, the taking could be no injury, and to give damages even for a perſonal injury would be abſurd and nugatory, ſince the lord might immediately, as ſoon as recovered rightfully, retake them from his villein. Therefore Littleton ſays, "a villein "cannot have an appeal of maim againſt his lord that "hath maimed him†. For, as the law then ſtood, *maim* was only puniſhable by fine and impriſonment, at the ſuit of the king, or by damages, in an appeal of maim, at the ſuit of the party. Neither could he have an appeal of robbery againſt him, though that offence, with reſpect to freemen, was capital; for the lord having a right to take, could not be guilty of robbery. However, there was one excepted

† Lib. 2. § 194.

excepted caſe, wherein the lord could not take things out of his own villein's hands, and wherein the villein alſo might maintain an action againſt him; but then, in this caſe, the villein acted not in his own right, but in that of another, *in autre droit*, as our law ſays, which was when a villein was made an executor. For here he acted not in his own right, but as repreſentative of his teſtator, for the performance of whoſe will, and for no other purpoſe, he had allowed to him this poſſeſſion againſt his lord, and this right of action againſt him.

Let us now ſee how many different ways a man might be a villein, how many ways the villenage, or its effects, may be ſuſpended, and how many ways it might be totally deſtroyed.

Now a man might be a villein either by birth, or become ſuch by his own act. With reſpect to birth, our law conſiders only the condition of the father, whether free or villein, contrary to the civil law, where the maxim is *partus ſequitur ventrem*. Our rule ſeems more agreeable to natural reaſon, as the huſband is maſter of the family, the head of the wife, and ſuppoſed, at leaſt, the principal party in the production of the offſpring. Yet the Roman law is not therefore to be charged with abſurdity, it proceeding on a principle peculiar to itſelf, namely, that they allowed no matrimony but between free perſons; a cohabitation between two ſlaves, or between a ſlave and a free perſon, was called *Contubernium*, not *Nuptiæ*, nor *Matrimonium*; and to ſuch a commerce their law did not give ſuch continuance, or entire credit, as to preſume the father to be certain. A free-woman who ſo far diſgraced herſelf as to cohabit with a ſlave, they ſuppoſed equally guilty

guilty with others; and therefore, as the father was uncertain, *in favorem libertatis*, they preſumed him a freeman. And, on the contrary, though a freeman cohabited with a ſlave, that law gave no credit to her conſtancy, but rather ſuppoſed the iſſue begat by one of her own rank, another ſlave. But in England, if the father was free or ſlave, the iſſue was ſo; for our law admitting ſuch marriages as good ones, upon the maxim, *whom God hath joined let no man ſunder*, gave them an entire credit. What then ſhall we ſay was the caſe of *baſtards*, where the father was entirely unknown, and who were *filii nullius*. Some old opinion in England indeed held, that if the mother was a neif, becauſe ſhe was certain, the iſſue ſhould be a villein; but this doctrine was exploded, and it was ſettled that, as the child was, by our law, to follow the rank of his father, and who that was, was entirely uncertain, it ſhould be univerſally preſumed in favour of liberty, that the father was a freeman, whatever the mother was. A baſtard, therefore, could not be a villein, but by his own act; and how a man could become ſo I ſhall next proceed to ſhew †.

There was then but one way for a freeman born to become a villein, I mean in the latter ages, when the practice of making ſlaves of captives taken in war went into diſuſe, and that was by his admiſſion and confeſſion. For *volenti non fit injuria* is a maxim of all laws, and in the antient times of confuſion, it might be an advantage, at ſome times, to a poor freeman to put himſelf, even in this low manner, under the protection of a lord that was both powerful and humane. But ſo careful was the Engliſh law

† Littleton, § 187, 188.

law of liberty that it did not allow every confeſſion or admiſſion to conclude againſt a man's liberty, but ſuch an one only as could not proceed from miſtake, inadvertence, or conſtraint. The confeſſion muſt be made in a court of record, and entered on record. Then indeed was it concluſive, for it is a maxim of our law, that there is no averring againſt a record, that is, charging it, or the contents thereof, with falſehood. For if that could be, property could never receive a final determination, nor a man be certain that the ſuit that he had obtained might not be renewed againſt him *.

But the law went farther in its precautions, and would not ſuffer any confeſſion, even in a court of record, to deſtroy liberty. If a man come voluntarily into ſuch a court, and made an extrajudicial confeſſion, that is where there was no ſuit depending, and conteſted in that court, it could not bind him. The confeſſion, to bind, muſt be made in ſuch a court, and a ſuit litigated there; ſo that there might be no room afterwards for pretending ſurprize, error, conſtraint, or terror. Thus, if a ſtranger brought any action againſt a man (for if the lord brings any action, except one kind only, againſt his villein, he the villein, is thereby manumized, as I ſhall obſerve hereafter) I ſay, if a ſtranger, A, brought an action againſt B, and B, to bar A, of his action, pleads on record, as he may, that he is villein to C, this confeſſion ſhall bind him, and he ſhall be C's villein, though he was in truth a freeman; yea though A, in that very action, had replied that B was a freeman, and had even proved him ſuch: And indeed this was but a juſt puniſhment, for his fraudulent attempt to deprive A of his action.

Again,

* Littleton, § 174.

Again, if a lord, claiming a man to be his villein, bring the writ called *nativo habendo*, the proper one to prove this fact, that the defendant was his villein, and the defendant confeſſes himſelf judicially ſo to be, he and his iſſue are bound, though he was free before; or if the defendant, in ſuch caſe, pleads he is a freeman, and the lord, to prove him his villein, produces the defendant's uncles, or couſins, who ſwear, that they and their anceſtors, from time immemorial, or from a time antecedent to the ſeparation of family, have been villeins to that lord and his anceſtors, whatever becomes of the original ſuit, they themſelves thenceforwards are the lord's villeins; and though they were in truth free, it is but a juſt puniſhment, as I obſerved before, for their foul attempt of reducing their kinſman to ſlavery. However, as we muſt allow that every man is fond of his own and his poſterity's liberty, we muſt accordingly believe that theſe inſtances of freemens becoming ſlaves voluntarily were very rare, and, that the majority of villeins were ſuch as were ſo by birth. Before I leave this head, I ſhould obſerve that, with reſpect to the iſſue of men becoming villeins by their own confeſſion, the iſſue born after the confeſſion alone were bond, as being ſo born, and that the children born before, retained the liberty they had acquired by their birth.

Villenage could not only be totally deſtroyed by many means, but alſo might be ſuſpended for a time, and afterwards revive. The ſuſpenſion aroſe from ſome ſubſequent obligation the villein, or nief, happened to lie under, which the law conſidered, and favoured more than the lord's right in his villein, or nief; therefore, if the king made a villein a knight, ſuch a creation, being for the defence of, and to encreaſe the military ſtrength of the realm,

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and the perſon obliged to ſerve accordingly, his ſtate of villenage was ſuſpended, not deſtroyed. For, if he was afterwards degraded from his order, he became the lord's villein again; ſo if a villein became a monk profeſſed, now was he obliged to live entirely in his monaſtery, and ſpend his time in prayers, and other ſpiritual exerciſes, duties inconſiſtent with his ſervice as a villein; and thoſe being performed to God were preferred to the intereſt of the lord; but if ſuch monk was deraigned, that is, degraded from his order, and turned out of his monaſtery, he became a ſecular man again, and the lord's right revived. But if a villein is made a ſecular prieſt, he not being confined to a monaſtery, nor his whole time dedicated to the ſervice of God, he is ſtill a villein and obliged to attend his lord at all times, when the ſtated times or occaſions of his new duty do not employ him. So if a nief marries a freeman, the right of the huſband in his wife, as founded on the law of God and nature, is preferred to the lord's, though prior, which is founded only on the conſtitutions of nations: She, therefore, is priviledged, and a free woman during the coverture; but if the huſband dies, or a divorce happens, then is ſhe a nief again. But it may be aſked, ſhall the lord thus, without any fault of, or conſent from him, be, by the act of others, deprived, even for a time, of his right in his villein, and the advantage thence ariſing? I anſwer, though the law, for the public good, ſuſpended the villenage, it did not leave the lord without redreſs for the wrong done unto him. For, in the caſes of profeſſion and marriage, the lord ſhall have his action againſt, and recover the damages he may ſuſtain, from the abbot who had admitted his villein a monk, or the huſband who married his nief; but againſt the king who has knighted his villein, he cannot have

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an action, for, according to the principles of the feudal law, to bring an action againſt the king is a breach of fealty: it is charging him with injuſtice, and with breaking that mutual bond, whereby he is tied to his vaſſals as ſtrictly as they are tied to him. But he ſhall not be without remedy. He ſhall have his action, and recover damages againſt thoſe, who by their aid, advice, counſel, or recommendation prevailed on the king to make his villein a knight. Coke mentions two caſes more, wherein I cannot ſay ſo fully as he ſays, the *villenage itſelf* is ſuſpended, as that the *effects* thereof are ſuſpended, as to a certain place; and both theſe are in honour of the king, one is when a villein eſcapes from his lord, and has continued for a year and a day in the demeſne of the king, doing ſervice to him as his villein. The lord can neither ſeize him, nor even bring a writ of *nativo habendo* againſt him while he continues in the royal demeſne. The other is where a villein is made a ſecular prieſt in the king's chapel. The lord cannot ſeize him in the preſence of the king *.

We ſhall next have a more agreeable ſubject, and by conſidering the many ways the law of England hath contrived to deſtroy villenage, have the pleaſure of obſerving its natural bent toward the equal liberty of mankind, and how it rejoiced to ſhake off the ſhackles of ſervitude, even in thoſe days when it admitted it.

* Coke on Littleton, lib. 2. ch. 11.

LEC-

LECTURE XXV.

The methods invented to deſtroy villenage—The bent of the law of England towards liberty—Copyhold tenants—Tenants in ancient demeſne.

RELATIVE to villenage, the following are the words of the antient judge Forteſcue, who wrote a treatiſe on the grounds of the Engliſh law, for the inſtruction of his pupil, the unfortunate ſon of the unfortunate king Henry the Sixth. *Ab homine, & pro vitio introducta eſt ſervitus; ſed libertas a Deo hominis eſt indita naturæ. Quare ipſa ab homine ſublata ſemper redire gliſcit, ut facit omne quod libertate naturali privatur* *. We are now to ſee how, and in how many ways, our law favours this natural propenſity to liberty. And the firſt and plaineſt is a direct enfranchiſement, or, as the Romans called it, *manumiſſion*. This, in the ancient times, before writing was common, uſed to be done, as all their important acts, (for the better preſerving them in memory) in great form. *Qui ſervum ſuum liberum facit, in eccleſia, vel mercato, vel comitatu, vel hundredo, (that is, the county court or hundred court) coram teſtibus, & palam faciat, et liberas ei vias, & portas conſcribat apertas, & lanceam, & gladium, vel quæ liberorum arma in manibus ei ponat* †. But after the uſe of writing became common, the method was by the lord's deed (mentioning

* Cap. 42. † Wilkins, Leg. Angloſax.

tioning him to be his villein, and expreſsly infranchiſing him) ſealed by the lord's ſeal, and atteſted by proper witneſſes, as other deeds between freemen ſhould be †.

Before I go farther, I ſhould obſerve the favour of the Engliſh laws to liberty in that, by it all manumiſſion, of what kind ſoever, was abſolute and irrevocable. Once a freeman, and ever ſo; whereas by the civil law, a freedman was bound to many duties towards his patron. A relation between them ſtill ſubſiſted, and if he was guilty of ingratitude, that is, of any of the many offences their law marked as ſuch, he was again to be reduced to ſlavery.

But beſides this ſpecies of expreſs enfranchiſement, there were many implied ones. Firſt, by the act of the lord alone, and others by conſtruction of law, upon the act either of lord or villein. By the act of the lord alone, namely, if he had entered into any ſolemn certain contract with his villein, giving him thereby either a permanent right of property, or a power to bring an action againſt his lord. In ſuch caſes he was inſtantly manumized, without expreſs words; for, otherwiſe, he could not have the benefit of the gift intended, and the lord's act, in ſuch caſes, ſhould be conſtrued moſt ſtrongly againſt himſelf. As if the lord gives land to his villein and his heirs, or to him and the heirs of his body, or to him for life; immediately on the giving livery and ſeizin, which was, as I have often obſerved, what compleated an eſtate of freehold, and made it irrevocable, the villein became free. Otherwiſe he could not enjoy the benefit of the grant, or protect it againſt his lord.

† Formulare Anglicanum, tit. Grants and Manumiſſions of Villeins.

The ſame was the caſe if the lord gave him any certain property, as a bond for payment of a ſum of money, or a yearly annuity, or a leaſe of lands for years. The villein could not ſecurely enjoy the benefit of the gift, without being able to bring an action againſt his lord, and conſequently being free againſt him. Yea, though the annuity or leaſe of land was but for years, the manumiſſion was abſolute for ever, and not ſuſpended for the years only; which was different from the caſes I put in my laſt lecture, of villenage being ſuſpended by the act, not of the lord, but another perſon; but here where the lord himſelf, by his own act, ſet him free, though but for a time, he was free for ever. But if the lord gave his villein lands to hold at will; this being of the ſame nature with the proper holdings of villeins, and the lord having reſerved in his own breaſt a power of ouſting whenever he pleaſed, the villein gaining thereby no certain property, he continued in his former ſituation.

Secondly, a man may be enfranchiſed without expreſs words, by conſtruction of law, operating on the act either of the lord or villein. If a lord had a mind to diſpoſſeſs his villein of lands, or of goods, he had a right to enter on the lands, or ſeize the goods, without ceremony; but if, waving this right, he brought an action againſt him for them, or if he brought not any action perſonal againſt him, but the one of *Nativo Habendo*, the villein was enfranchiſed, whether the lord recovered or not, or whether he proſecuted the action or not. For when he omitted the eaſy remedy the law appointed, and brought his villein into court to defend his right, he admitted him to be a perſon that could ſtand in judgment againſt him, and litigate with him; that is, to be a freeman. But it muſt be obſerved this enfranchiſement did not commence immediately from the taking

taking out the writ, which was the commencement of the action, but from the appearance of both plaintiff and defendant, and this for the benefit of the lord; for otherwise, as Coke obſerves, a ſtranger, by colluſion with a villein, might take out an action againſt him in his lord's name. To which I may add, that the lord might have intended his action againſt a freeman of the ſame name with the villein, and the ſheriff might have ſummoned the villein by miſtake. In this caſe it was hard that the lord ſhould ſuffer. He therefore might, when he ſaw the villein ready to appear, nonſuit himſelf, that is, decline appearing; and then the villein could not appear, and therefore was not enfranchiſed. But if he went on, and ſuffered his villein to appear, and conſequently enabled him to plead againſt him, he muſt have abided by the conſequences of his own folly, and his nonſuiting himſelf afterwards could in no ſort avail him †.

A villein might likewiſe be manumitted by his lord's bringing a criminal action againſt him, though this was no admiſſion of permanent property in him, or of his capacity of ſtanding in law againſt him as a freeman; as if the lord brought an appeal of felony, as of murder, or robbery, againſt him. If he was acquitted he might be enfranchiſed, becauſe he might be entitled to recover damages for the malicious proſecution, and the danger his life had been in; and damages he could not recover without being a freeman. I ſay *might* be enfranchiſed, becauſe he *might* recover damages. For in this caſe a diſtinction is to be taken, whether the villein was, before the appeal brought, indicted at the ſuit of the king for the ſame offence, or was not. If he

† Hickeſ. diſſert. epiſt. p. 13. et ſeq. Brady's hiſt. p. 82. Fitzherbert's natura brevium, p. 187, 189, 190. Cowell's interpreter, voc. copiehould. Coke on Littleton, lib. 2. chap. 11.

was not, the acquittal ſhewed the proſecution to be malicious, and the villein was entitled to recover damages, and ſo to be free. But if he had been indicted, there were no grounds to ſuppoſe the appeal brought maliciouſly. The finding the indictment by the grand jury was a preſumption of his guilt. The lord had a rational ground for bringing his appeal, and he had a right to bring it for the puniſhment of his villein, if guilty. Otherwiſe he could not have him hanged, for the indictment at the king's ſuit might not be proſecuted, or the king might pardon. In ſuch caſe, therefore, there being no malice preſumed, the law gave no damages, and conſequently no enfranchiſement. But the lord's bringing the writ called *Nativo habendo* againſt his villein, namely, claiming a man to be his, as ſuch, was no enfranchiſement, for that would defeat the ends of the ſuit; and the law allowed the lord a power to ſeize his villein without further ceremony, it did not preciſely compel him to that method only, for his villein might be at too remote a diſtance, or under the protection of perſons too powerful. But if, after appearance, the lord ſuffered himſelf to be nonſuited, in this action, it was an enfranchiſement.

The law, likewiſe, enfranchiſed in ſome caſes on the act of the villein himſelf, as if the lord had been found guilty in an appeal of murder, brought by his villein, or of rape by his nief; but theſe I mentioned in the laſt lecture, and the reaſon is apparent.

By all theſe various ways the number of villeins inſenſibly diminiſhed, and the number of freemen continued to encreaſe in every reign; but what gave the finiſhing ſtroke to ſervitude were the confuſions occaſioned by the

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two contending houſes of York and Lancaſter; when the whole kingdom was divided, and every lord obliged, even for his own ſecurity, to take part with one ſide or the other; and when once engaged, neceſſitated to ſupport his party with his whole force. Villeins were, therefore, emancipated in prodigious numbers, in order to their becoming ſoldiers. Many of ſuch, alſo, who had not been formerly emancipated, in thoſe times of diſtraction, fled for ſelf-preſervation to London, and other cities, where, being abſent from their lords, they were looked upon as free; and where they generally continued, even after theſe troubles had ceaſed, unknown to the heirs of the antient lords; and in conſequence, for want of proof of their ſervitude within fifty years laſt paſt, (which was the time of limitation for this action) moſt of them and their poſterity became free. When things afterwards became compoſed, under Henry the Seventh, many of theſe perſons were by the heirs of their former lords reclaimed, and recovered as villeins, though, undoubtedly, the far greater part eſcaped undiſcovered. But even in thoſe actions that were brought, both judges and juries were very favourable to the perſons claimed; the juries out of favour to liberty, and the judges, I preſume, following the policy of that reign, one of the great objects of which was the depreſſion of the great lords; to which nothing could more contribute than the leſſening the number of the perſons who were held in ſuch ſtrict dependance by them, and the profits of whoſe induſtry they had right to ſeize, and to encreaſe their wealth and their power †.

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† Carte, hiſt. of England, vol. 2. p. 845. 846. 846.

Another thing which had, long before that period, leſſened their numbers, was the riſe of copyhold tenants. Theſe are perſons who are ſaid to hold lands *at will, but according to the cuſtom of a manor*, and thoſe aroſe from the villenage tenants, as I conceive, by the following means. When a ſucceſſion of mild and humane lords had neglected, for a long time, to ſeize their villeins goods, or to exact villein ſervice, ſo that no memory remained of their having made uſe of ſuch a practice, they came to be conſidered in another light, and became exempted from that ſeizure by preſcription. For the lord claiming a villein in a *nativo habendo*, muſt plead, and prove, that he, or his anceſtors, had exacted ſuch ſervices, from the perſon claimed, or his anceſtors, otherwiſe he failed. Therefore, in the caſe I have mentioned, though a future lord had an inclination to depart from the practice of his predeceſſors, and revive his rights, he could not recover them for want of proof; and theſe perſons ſo long indulged, became freemen. However their lands, (they being only tenants at will) might ſtill be reſumed, until, at laſt, they got, likewiſe, by the ſame kind of preſcription, a permanent right in them alſo, in the way I now ſhall relate.

If a lord had given his villein any certain eſtate, it was, as I before obſerved, an abſolute manumiſſion for ever. But ſome lords, either in reward for ſervices done, or out of bounty, gave many of thoſe underling tenants, if not an abſolute right to their holdings, at leaſt, a fair claim and title to a permanent eſtate, which, in honour, the lord or his heirs could not defeat, and yet kept them in a particular kind of dependance, between freedom and abſolute villenage. But the queſtion was how this was to be done; for if the lord had given him a deed, to aſſure him the lands,

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and ſo entered into a contract with him, he was entirely emancipated. The way was then for the lord to enter into the roll of his court, wherein he kept the liſt of his tenants, that he had given ſuch an one an eſtate at will, to hold to him and his heirs, or to him and the heirs of his body, or to him for life or years; and theſe directions being conſtantly complied with, grew by length of time into eſtabliſhed rights, and they came to be called *tenants at will, according to the cuſtom of the manor.*

They were ſtill called tenants at will, becauſe, they had been originally ſuch, for they were never conſidered as, nor called, *freeholders*, until very lately, in one inſtance, they were admitted to vote for members of parliament, and their votes allowed by the houſe of commons. This deciſion was greatly exclaimed againſt by the tories, who were foiled by this reception, as proceeding from a ſpirit of party, and as being contrary to the rules of the antient law, as it certainly was. But, on the other hand, it was agreeable to common reaſon and juſtice, and to the ſpirit and principles alſo, though not to the practice of the antient conſtitution. For when Edward the Firſt lays down this maxim, *quæ ad omnes pertinent ab omnibus debent tractari*, what reaſon can be aſſigned why a copyholder for life, who has a valuable, and as certain eſtate, in fact, as a freeholder, though called by a different name, and who contributes equally to the taxes and expences of the government, ſhould not have equal privileges, and be equally intitled to be repreſented? They are called *copyholders*, from the evidence they had of their titles. The evidence that freemen had of their eſtates in land was either a *deed*, if the grant was by deed, or if it was without deed, the *livery and ſeizen*, atteſted by the witneſſes preſent; but the copyholder had no deed, neither was livery and ſeizen given to him, as he was originally

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but a tenant at will. His evidence, therefore, was a copy of the rule entered in the lord's court roll, which was his title, and from hence was he named copyholder †.

The peculiarities attending this kind of tenure, that diſtinguiſhed it from other tenures, aroſe from their being conſidered as tenants at will. Hence aroſe that antient opinion, that if a lord ouſted his copyholder, he could have no remedy by action in the king's court againſt him: But had this been the law that ſince prevailed, all copyholders had been long ſince deſtroyed. Therefore, in Edward the Fourth's reign, it came to be ſettled, that if the lord turned out his copyholder, he might well maintain an action of ejectment againſt him, as a tenant for years could, or elſe they might ſue the lord in equity to be reſtored.

From the ſame principle of its having been an eſtate at will, aroſe the right of the lord to a fine, upon the change either of lord or tenant; upon the change of the lord by the act of God only, that is by his death; upon the change of the tenant, either by the act of God, by his death; or by his own act, by his alienation. But the tenant paid no fine on the lord's alienation; for if he was ſo to do, he might be ruined by being frequently charged. Theſe fines were an acknowledgment of the lord's ancient right of removing them, and were, in ſome places, by cuſtom, fixed at a certain rate; in others, they were uncertain, and ſettled by the lord: However, he was not allowed to exact an unreaſonable one, for if ſo, the tenancy would have been abſolutely in his power, and of the reaſonableneſs of the fine the judges of the king's courts were to determine.

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† Fitzherbert's natura brevium, p. 28. Kitchen on Courts.

I mentioned the alienation of copyholders, but to alien directly they could not, being eſteemed but tenants at will, yet what they cannot directly do, they may indirectly, by obſerving certain forms; that is, by ſurrendering to the lord, to the uſe of ſuch a perſon, and then the lord is, in equity, compellable to admit into the copyhold the perſon for whoſe uſe it is ſurrendered. Theſe ſurrenders are either made in the manor court, or out of it. If made in court, it is immediately entered in the court roll; if out of court, it ſhould be preſented at the next court day, and then entered. The ſurrender out of court muſt be made to the lord himſelf, or to the ſteward of the manor, or it is not good; except in ſome particular manors by cuſtom, where it may be ſurrendered to the lord's bailiff, or to two or more of the copyholders, who are to preſent it at court. When a ſurrender was made, the lord was only an inſtrument to hand it over, and therefore muſt admit that grantee into ſuch eſtate, and no other, whom the grantor had appointed in his ſurrender. In many caſes a court of equity will ſupply the want of a ſurrender.

Copyholders could not deviſe their lands by will for two reaſons. Firſt, that, in general, lands were not deviſable till the reign of Henry the Eighth; and for another reaſon peculiar to themſelves, that, being called tenants at will, they were not looked upon to have a ſure and permanent eſtate. But when, after the invention of *uſes*, a way was found out to evade the general law, and to make lands go by will, by the owner granting his eſtate to another for the uſe of himſelf, the grantor, for life, and after, for the uſe of ſuch perſons as he, the grantor, ſhould name in his will; and when courts of equity were found diſpoſed to oblige the grantee to perform the truſt he had undertaken, in imitation hereof, copyhold eſtates began to be ſurrendered

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to the lord to the uſe of the copyholder's laſt will; and then the lord, after his death, was obliged to admit ſuch perſon as he appointed in ſuch his will, and in the mean time, the copyholder enjoyed during his life, for the ſurrender only did not transfer the eſtate, except it was to the lord's own uſe. If to any other uſe, the lord was but an inſtrument, and the land remained in the ſurrenderer until the admittance of the new tenant, which, in the caſe I have put, could not be till the old one was dead.

Another peculiarity ariſing from the ſame ſource, there being tenancies at will, was, that neither the huſband could be tenant by the courteſy, nor the wife tenant in dower. The reaſon was, that every eſtate at will determined by the death of the tenant, neither could an eſtate tail be created of a copyhold; for the ſtatutes *De Donis* extended not to them, and, therefore, if a gift was made in ſuch words as would, at this day, create ſuch an eſtate, it would be in the nature of a *fee ſimple conditional* at common law. However, by ſpecial cuſtom in particular manors, copyhold might be entailed; might go to the tenant by the courteſy, and the wife might be endowed thereout ‡.

Thus much I have thought requiſite to ſhew the general nature of this tenure, and of its origin. More would be needleſs to ſay here, as there are no ſuch in this kingdom, though the law relating to them makes a conſiderable part of the law of England. For the ſame reaſon I ſhall be very ſhort as to the tenants in antient demeſne.

Lands in *antient demeſne* are the eſtates that the king had, as king, to ſupport his family, and other expences, and were antiently unalienable. They were the lands of Edward the

‡ Coke on Littleton, lib. 1. chap. 8.

the Confeſſor, and the Conqueror. But as the king could not make profit of them himſelf, they were given to tenants of two kinds, freeholders and copyholders. The law with reſpect to them ſtands as it does with other freeholders and copyholders, except that they have ſome peculiar privileges. The general reaſon of theſe privileges was, that the freeholders were originally ſocage, and the copyholders the villenage tenants of the king, and had theſe privileges granted to them becauſe they were ſuppoſed conſtantly employed on the king's land, to furniſh him with corn, cattle, and other neceſſaries; and their privileges have continued, though the ſervices have been changed into money, and the eſtates almoſt all alienated from the crown. Theſe are principally as follow: They are exemped from all burthens and taxes laid on by parliament, unleſs they are ſpecially named. They are not to be taxed for the wages of the knights of the ſhire. They are not to pay toll, or paſſage money for goods bought and ſold in markets, for all things concerning huſbandry and ſuſtenance. They are not to be impleaded in any court, only in their manor court, nor to be ſummoned as jurymen, with ſome other privileges of the like nature, not neceſſary to be here inſiſted on†.

† Madox, Hiſt. of the Exchеq. vol. 1. p. 295. Cowell's Intrepreter, voc. Demaine. Spel. Gloſſ. voc. Dominicum.

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LECTURE XXVI.

The condition and ſtate of laws in England during the Saxon times—The military policy of the Saxons not ſo perfect as that of the Franks—Their Kings elective—The diviſion of the kingdom into ſhires, hundreds, and tithings—The adminiſtration of juſtice—The county-court—The hundred court and court-leet—The court-baron—The curia regis—Method of trial in the Saxon courts—The ordeal—The waging of law—The trial by battle—Juries.

HAVING drawn a rough delineation of a feudal monarchy, and given a general account of the ranks of people of which it was compoſed, and of their diſtinct rights and privileges, it will next be proper, agreeably to what I firſt propoſed, to obſerve, through the ſeveral reigns, the progreſs of Engliſh law, and by what ſteps and gradations it is come to differ ſo widely from what it was in its original; not, indeed, to go minutely through all the alterations made, for that would be a taſk that could not be confined within the compaſs of theſe lectures, but to point out the great and conſiderable changes, which had extenſive influences, and contributed to give the law a new face. But, before I enter upon this, it will not be amiſs to look back a little, and to ſay ſomething with reſpect to the law in the Saxon times, ſince much of that remained after the conqueſt, and even makes a part of our law at this day.

The

The Saxons, being a German nation, brought into England the cuſtoms of that country, cuſtoms very ſimilar to, and, in many inſtances, exactly the ſame with thoſe uſed abroad on the continent. However, with reſpect to their military policy, it was not ſo ſtrict and perfect as that of the Franks, occaſioned, as I ſuppoſe, by their greater ſecurity from danger. For they had no reaſon to dread the Britons, having extirpated many, and expelled the reſt, except a few whom they kept in the meaneſt offices, in the nature of villeins. Neither was the authority of their kings ſo great as abroad, for the founders of the kingdoms of the heptarchy were not kings in Germany, as the kings of the Franks and other nations had been, but only leaders of adventurers, who voluntarily aſſociated themſelves, and therefore could have no authority but what their followers confirmed upon them; and that it was not very conſiderable, appears from this, that every thing of great moment was tranſacted in their general aſſemblies or *wittenagemots* †.

Theſe kings were elective, though generally thoſe of the ſame family, (for to this alſo there were ſome exceptions) were elected. Offa ſays of himſelf to his people, *Electus ad libertatis veſtræ tuitionem, non meis meritis, ſed ſola liberalitate veſtra.* From the death of a former king to the election of a new one there was an *interregnum*, and even during theſe interregnums they made laws. For when the excellent king *Brithric* had been poiſoned by his queen, they enacted a law, that if any future king ſhould give his wife the title of queen, he ſhould forfeit his dignity, and his ſubjects ſhould be free from their oath of allegiance; and then they pro-

† Bacon's diſcourſe on the Laws and Government of England, part 1. chap. 16.

proceeded to elect Egbert, Brithric's tenth couſin. And, in purſuance of this law, Ethelbald depoſed his father, for giving that title to Judith of France. Alfred, indeed, was not choſen upon a vacancy, but claiming a part of the kingdom before the aſſembly at Swinburn, by virtue of an agreement with his brother Ethelred, that aſſembly annulled the agreement, as deſtructive to the nation, then threatened by the Danes, but enacted that Alfred ſhould ſucceed to the whole, though Ethelred, and alſo their elder brother Ethelbert left ſons ‡.

I know it is generally ſaid that theſe three brothers ſucceeded by their father's will, and ſo the Conqueror pretended a will of Edward the Confeſſor in his favour, but what had Ethelwulf to leave, but the little kingdom of Kent, which was aſſigned to him upon his depoſition? Beſides his will was, that they ſhould ſucceed in caſe of iſſue failing, and they ſucceeded though there were ſons; and Alfred, who ſhould know his own title beſt, acknowledged he had received his crown from the bounty of the princes, elders, and people. Here I ſhall mention, that the kings had not a right to marry themſelves without the conſent of their people, for of Alfred it is obſerved, that he did ſo, *contra morem & ſtatuta*, not only againſt cuſtom, but againſt poſitive laws. To go through no more particulars; it appears from hiſtory, that all the kings of the Saxon race were elected; ſo were the Danes; ſo was the laſt Harold, though not of royal blood, and though Edgar Atheling, who was the lawful heir, had the kingdom been hereditary, was living; ſo was the Conqueror, and that was the juſt title he had. But enough of this point.

To

‡ Tyrrel's general Introduction to his Hiſt. of England. Hume, append. 1.

To ſee how juſtice was adminiſtered among the Saxons; the kingdom, for this purpoſe, was divided into *ſhires*, thoſe into *hundreds*, or, as we call them in this kingdom (Ireland) *baronies*, and theſe into *tithings*, ſo called becauſe they originally conſiſted of ten contiguous families, over which a *tithingman* preſided. Every man, in theſe tithings, was bound to keep the peace, not only for himſelf, but for the others of his tithing; and if one of them committed a crime, the reſt were obliged to ſearch him out, and produce him for trial, otherwiſe the tithing was grievouſly amerced. This diviſion of the kingdom into *counties*, and their ſubdiviſions, is generally aſcribed to king Alfred. That the diviſion of hundreds into tithings was his is undoubted; and it is probable the diviſion of counties into hundreds was his alſo; that the people, beggared by the Daniſh incurſions, might have juſtice rendered to them nearer their own homes, without the expence, the fatigue, and even danger of travelling to the county town. But as to counties, they certainly were more antient. Juſtice could not be adminiſtered, according to the principles of the German policy, in a country ſo large as one of the kingdoms of the heptarchy, without its being ſubdivided; and accordingly, during thoſe times, before the union of theſe kingdoms into one, we find, in the old laws, the mention of *ſhires* and *ſheriffs* ‡.

But though Alfred was not the firſt maker of the diviſions, we are not therefore to charge the writers that give that account with falſity. Even before his reign the Danes had made ſettlements in England, in the northern parts. In

‡ Spelm. Gloſſ. voc, Comitatus, hundredus, et trithinga. Tyrrel's introduction to his Hiſt. Carte's Hiſt. vol. 1. p. 310. Spelm. life of Alfred. Gurdon's Hiſt. of Court Baron and Court Leet.

In the very beginning of it they reduced him to content himſelf with the countries ſouth of the Briſtol channel and Thames, with the addition of Eſſex, which, in their ravages, they had thrown into the greateſt confuſion. The reſt of England was left as their prey, in which, after ravaging it ſeveral years, they fixed themſelves, until, at length, this great prince, to whom no king, I may ſay, no man, whom hiſtory has recorded, was ſuperior, either for piety to God, for a ſtrict love of juſtice, for a fatherly affection to his people, for heroiſm in battle, for fortitude of mind, (that never deſpaired in the loweſt ſtate of his affairs, when all ſeemed deſperate) or for a wiſdom capable of directing upon every occaſion the proper meaſures to be taken by the ſtate over which he preſided; I ſay, until this great prince trampled his enemies under his feet, and obliged the Danes, who had ſo long looked upon him with contempt, to ſue to become his ſubjects, and to receive the lands they had uſurped, from him as their king and lord. For to expel them was impoſſible, and if it had been otherwiſe, and the matter had been effected, they had committed ſuch maſſacres in the lands, they poſſeſſed, that the country would have been deſolate. Then, indeed, this king ſettled the limits of ſhires or counties, through all England; in Eſſex, and the counties ſouth of the Thames, I preſume, according to the old limits. For if we allow for one county being more woody, or having more unprofitable land than another, they appear to bear no great diſproportion to each other. But, as to the lands the Danes held, it was different, for here, to win his new ſubjects, he was to accommodate the diviſion ſomewhat to that which they had made among themſelves, under their ſeveral leaders. Hence, in that part of England which was then Daniſh, we find the greateſt difference between the ſize and value of the lands in the ſeveral counties, ſome exceſſively large, and

others

others as exceedingly ſmall; which, I think, is no way to be accounted for, in ſo wiſe a prince, but that the ſeveral tribes of theſe Danes were to be kept in their old bounds, and ſeparate from each other. In ſuch a ſucceſſion of ages, undoubtedly, theſe boundaries have received alterations, but they could not have received ſuch as would account for the diſproportion; and in truth we find the Danes had divided the land before he conquered them.

In thoſe counties and hundreds juſtice was adminiſtered to the inhabitants near their homes, without the delays and expences of reſorting to Weſtminſter. The court held by the ſheriff, aſſiſted by the biſhop, was, in its origin, as we find in the red book of the exchequer, and had cognizance of four ſeveral matters that were handled, in this order. Firſt, all offences againſt religion and the eccleſiaſtical juriſdiction were tried. The biſhop, or his commiſſary, here was judge, and the ſheriff was his aſſiſtant; and if the delinquent diſregarded the cenſures of the church, he enforced the ſentence by impriſonment. Next were tried temporal offences, that concerned the publick, as felonies, breach of the peace, nuiſances, and many others. Here the ſheriff was judge, and the biſhop was aſſiſtant, to enforce the ſentence with eccleſiaſtical cenſures. Thirdly, were tried civil actions, as titles to lands, and ſuits upon debt on contracts. Here the ſheriff preſided, but the *ſuitors of the court*, as they were called, that is, the freeholders, were the judges, or as we now ſay, the *jury*, and the ſheriff executed the judgment, aſſiſted by the biſhop, if need were. Laſtly there was held an *inqueſt*, to ſee that every perſon above twelve years of age who was in ſome tything, had taken the oath of allegiance, and found ſecurity to the king for his good demeanor. This was called the *view of frank pledge*, that is, the viewing that every

perſon had nine freemen pledges or ſecurity for his loyalty to the king, and his peaceable behaviour to his fellow ſubjects†.

But ſince the time of king Edgar, at leaſt, this court has been divided into two, the criminal matters, both eccleſiaſtical and civil, and alſo the view of frank pledge was diſpatched in one court called the *tourn*, that is, the *circuit*, from the biſhop and ſheriffs going circuit through the county; and the civil buſineſs was diſpatched in another, called, the *county court*. The law was, that the ſheriff and biſhop ſhould twice in the year go their circuit or tourn, namely, in the month following Eaſter, and the month following Michaelmas; and ſhould hold their court in every hundred of the county; but the view of frank pledge was to be taken only once a year, namely the tourn after Eaſter. But for the more ready diſpatching civil cauſes, the county court was held once a month, that is in twenty-eight *days*, reckoning a month by four weeks and not by the calendar‡.

Out of theſe courts were others afterwards derived, for the more eaſy and expeditious way of diſtributing juſtice. Out of the ſheriff's tourn, were two, the *hundred court*, and the *court leet*, and they had cognizance of the ſame matters the tourn had, and were erected independent of the ſheriff's tourn, for the mutual eaſe of him and the inhabitants, where, in large counties, the hundred lay too remote to be conveniently viſited in the circuit. But many inconveniencies ariſing from the ſheriff's power not running in theſe ſeparated juriſdictions, the hundred court, which was held by

† Gurdon's hiſt. of Court Baron and Court Leet. Cowel's Interpreter, voc. Frankpledge. Bacon's Diſcourſe on the Laws and Government of England, part. 1. chap. 23.

‡ Bacon, chap. 24.

by the ſteward of the hundred, were all, except a very few, that had been given in fee to ſome great men, reunited to the tourn, and ſo they vaniſhed in Edward the Third's reign †.

The leet was of the ſame nature as the hundred court, derived out of the tourn, and made a ſeparate juriſdiction; but it was held in the name of a ſubject, by the lord of the manor's ſteward, and to the lord belonged the profits of the courts leet. They were, however, though held by a ſubject, in his own name, eſteemed as the king's courts, and allowed to be courts of record, as well as the tourn from which they ſprung.

Out of the county court, which was for private cauſes, was derived the *court baron*. It was held from three weeks to three weeks, as all courts were in the early Saxon times. It was when a manor was exempted from the ſheriff's county court, and the juriſdiction granted to the lord, to hold plea of civil ſuits. In this the ſuitors were the judges, as in the county court ‡.

In theſe ſeveral courts was juſtice adminiſtered in the Saxon times, and even for a conſiderable time after the conqueſt, for the moſt part. But ſoon after that time inconveniencies were found, partly from the partiality of the judges in theſe inferior courts, and partly, from their ignorance in law. Then began the higher court to draw to themſelves the juriſdiction of theſe matters, and the county courts to be confined to pleas of ſuch matters as exceeded

† Bacon's Diſcourſe on the Laws and Government of England, chap. 25, 26.

‡ Dugdale's Origines Juridiciales, chap. 9, 10, 11, 12, 13, 14, 15.

forty ſhillings in value. The pleas of lands were likewiſe brought in there, and diſcuſſed either in the higher courts, or before juſtices of *niſi prius*. The appointment of *juſtices errant*, and *juſtices of aſſize*; of *juſtices of gaol delivery*, and of the *quarter ſeſſions*, together with the many powers granted by divers acts of parliament to one or more juſtices of the peace, have, in a ſucceſſion of ages, continually ſunk the buſineſs of theſe courts, and have left them but a ſhadow of what they were.

But although moſt of the buſineſs in the old times was in theſe inferior courts, there was one ſuperior, that even in the Saxon times, had a concurrent juriſdiction with them, the *curia regis*. The curia regis ſat in the king's palace, and removed with him from one part of the kingdom to another, generally in the king's hall; except when they judged queſtions belonging to the king's treaſure, when they ſat in his treaſury, called the *exchequer*, from the chequered cloth wherewith the table was covered. The judges were, the juſticiary, the chancellor, and the treaſurer, together with ſuch great lords as were attendant on the court; ſo that, in parliament time, all the great lords ſat there; and this was the foundation of the lords judicature in parliament. The juſticiary preſided in all caſes that did not concern the revenues, and indeed his power was ſo exorbitant by the antient law, being regent of the kingdom in the king's abſence, that ſome time after the conqueſt, the kings thought proper to aboliſh the office, and divide even his judicial power into ſeveral hands †.

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† Madox, Hiſt. of Excheq. chap. 1.

The chancellor was one of the moſt learned eccleſiaſtics. It fell naturally to his province to make out all writs, and proceſſes, and letters patent, and conſequently the great ſeal of the kingdom was lodged with him. He attended, likewiſe, ſomething in the nature of an equity judge; not that there was any ſuch thing as a diſtinct *court of equity*, but, as a learned and pious man, to direct with his advice, whenever the caſe happened, where conſcience dictated one way, and the ſtrict law another. The treaſurer was preſent alſo, to take care that the king had his fines from offenders, which he was afterwards to collect into the exchequer where he preſided, where alſo he ſet leaſes of the king's lands for years, collected his rents and debts, and took care of his eſcheats and forfeitures. The proper juriſdiction of this court was where the king was concerned in intereſt as to his revenue; where one of the great peers was to be tried for heinous offences, or even where two perſons had been guilty of crimes that ſeemed to have a general influence, and tended to general confuſion. For unleſs the crime of a lower perſon was very heinous indeed, he was tried in the country, in the tourn.

Civil cauſes likewiſe between the great lords fell under their inſpection, but thoſe between meaner perſons they ſeldom meddled with, unleſs they had for difficulty been referred or adjourned to them from the courts below, and if they, in that caſe, found the cauſe of great difficulty, they adjourned it to the *curiæ regis* in full parliament. However, as they had the power of judging civil cauſes between all perſons in the firſt inſtance, if they thought the cauſe of ſuch a nature, that juſtice was not likely to be done in the country, they had many applications from ſuch as had thoſe apprehenſions; and as this court had a diſcretionary

cretionary power, either of ſending them back to the county-court, or of admitting them here, this gave an occaſion for exacting fines for licenſe to plead in the king's court, and thereby of encreaſing his revenue; until at length, when the inferior courts declined in reputation, and every man ſought for juſtice in the *curia regis*, theſe fines, being arbitrary, became an intolerable grievance, which was remedied by thoſe famous words in Magna Charta, *Nulli vendemus, nulli negabimus juſtitiam*, as I ſhall obſerve hereafter. Such were the courts held in the Saxon times, and for ſome time after the conqueſt, whoſe ſeveral juriſdictions it is proper to point out, for the better underſtanding of the alterations that afterward enſued †.

I next proceed to the *method of trial*, or determining the matters in iſſue in theſe courts. And they were the ſame that were uſed abroad, which I have already mentioned, and ſhall therefore barely run them over. Firſt, *ordeal*, either by putting their hands in boiling water, or holding a red hot bar of iron in their hands; or by *cold water*, that is, tying their hands together, and their feet together, and throwing the perſon accuſed into a pond; and this method the ignorant vulgar have adopted to try witches. Secondly, the *oath* of the party, with *compurgators*, or, as it is called, *waging his law*; and in this manner was Earl Goodwin acquitted of the murder of Alfred, King Ethelred's brother. Thirdly, *battle*, which was the uſual method of trying the title to lands, and appeals of felony, or capital crimes.

If a man was indicted of felony at the king's ſuit, he could not offer battle; for challenging the king was a breach

† Madox, Hiſt. Exchcq. Dalrymple on Feudal Property, ch. 7. § 1.

breach of alledgiance, but if he was appealed of felony by a ſubject, he had his choice either of battle, or ſubmitting to be tried by a jury. But if he waged battle, he muſt fight in proper perſon, whereas the appellant, who might be an infant, or decrepid with age, or a man of religion, or a woman, was allowed a champion. If lands were demanded from a man, he had, likewiſe, the option of trial by battle, or by *grand aſſize*. If by battle, then were both parties allowed champions, if they deſired it; but the champion, in ſuch caſe, muſt firſt ſwear, that he knows the land was the right of the party he fought for, or that his father told him he knew it, and charged him to bear witneſs thereof. So that this trial was referring it to the providence of God, which of the two contradictory witneſſes, the champions, ſwore true †.

The other method was by the grand aſſize. *Aſſize*, coming from *aſſideo*, to ſit together, ſignifies a jury. It was called *grand*, becauſe of its number. The ſheriff returned four knights, who choſe twelve knights more, and their verdict determined. But the moſt uſual method of trial among the *Saxons*, was by *juries*, as at this day, that is, by twelve of the *pares curiæ*. The invention of theſe is attributed by the Engliſh lawyers to Alfred, and greatly do they exult over the laws of other countries in the excellency of this method. But had they been acquainted with the ancient laws of the continent, they would have found out the trial by *pares* common to all the northern nations, though ſince wore out by the introduction of the civil law; not ſo common, indeed, any where as in England; where every age

† Dugdale, orig. Jurid. ch. 25. 26. Nicholſon, præfat. ad. leg. Anglo-Sax. Du Cange, voc. Duellum et Juramentum. Spel. voc. Campus et Judicium Dei. Muratori antiq. Ital. Diſſertat. 38.

age it gained ground, and wore out the other†. Alfred's merit therefore, was rather in fixing the number, and determining the qualities of the jurors, than in the invention; but what theſe ſeveral qualifications were, will come in more properly in another place.

† Stiernhook de jure vetuſto Sueonum et Gothorum, c. 4. Diſſert. on the antiquity of the Engliſh Conſtitution, part 4. § 4.

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LECTURE XXVII.

The puniſhment of public crimes and private wrongs among the Saxons—The ranks of men among the Saxons—The difficulty of aſcertaining the nature of the Saxon eſtates, and the tenures by which they were held.—Obſervations to prove that the Saxon lands were in general allodial.

IN my laſt I gave an account of the courts wherein the Saxons adminiſtered juſtice, and of the ſeveral methods of trial uſed in them; it will be proper to add a few words concerning their *puniſhment* of perſons found guilty either of public crimes or private wrongs. When I ſpoke of the cuſtoms of the German nations, while they lived in that country, I obſerved, that all offences were puniſhed by *fines* only, and none by *death*, two only excepted, deſertion in war, and the rape of a married woman. The nations deſcended from them, when they ſettled within the limits of the Roman empire, continued the ſame practice for ſome ages, as did the Saxons alſo in England.

All wrong and crimes, not excepting murder and high treaſon, were redeemable by fine and impriſonment, until the Heptarchy was declined; and for this purpoſe their laws aſſigned the ſeveral mulcts that were to be paid for the different offences. Murder was rated higher or lower according to the quality of the perſon ſlain. That of their king himſelf was valued at thirty thouſand *thrymſæ*, a piece of their money. But afterwards it was found neceſſary to inflict capital puniſhments. Treaſon, murder, rape, and robbery

robbery, were of the number ſo puniſhed, though the puniſhment of rape was afterwards *caſtration*; but after the Conqueſt it was made capital again. Corrupt adminiſtration of juſtice was another; for it is recorded, to the praiſe of Alfred, that he hanged forty four unjuſt judges in one year †. Theſe were the judges in the tourns, ealdermen of the counties, or their deputies the ſheriffs. Other offences againſt the public continued puniſhable by fine and impriſonment, and ſatisfaction for private wrongs was obtained either by reſtoration of the thing unjuſtly detained, if it was extant, or a compenſation to the value in damages, if it was not ‡.

As to the order and ranks of people among them, there were, properly ſpeaking, but two, *freemen* and *villeins*. The laſt, I preſume, were the remains of the antient Britons, but among the freemen there were various orders, not diſtinguiſhed by any hereditary difference of blood, but by the dignities of the offices they held by the gift of the king. Not that we are to imagine there was no regard whatſoever paid to the deſcendants of great and illuſtrious men. As their king was eligible out of the royal family only, ſo there were a number of other families, to whom the enjoyment of theſe honourable offices were, I I may ſay, confined, not by any poſitive diſtinctive law, but by general practice, and by the king's conſtantly chooſing out of them; and who may, with propriety enough, be called the *nobility*. Thoſe honorary offices were of different ranks of dignity; ſuch as thoſe of *ealdermen* or *earls*, *coples*,

† Mirroir des Juſtices, chap. 2.

‡ Tacit. de Mor. Germ. c. 21. L. L. Wal. p. 192. 194. L. L. Anglo, Sax. ap Wilkins p. 18. 20. 41. Hickeſ. diſſert. Epiſt. p. 110. Lindenbrog. 1404.

coples, or as they were ſometimes called *Thanes*, *Præpoſiti*, or rulers of hundreds; all of whom were, originally, removeable at the king's pleaſure, though, unleſs they miſbehaved, they were generally continued for life.

Some, indeed, have thought that earldoms were hereditary, even in the Saxon times, becauſe they ſee that earl Goodwin's ſon ſucceeded him, and the ſame was true in ſome families alſo. But there is a great difference between a ſon's ſucceeding to his father by a legal right of inheritance, and his ſucceeding either by the voluntary favour of the king, or by his extorted favour, when a family has grown ſo powerful, as to make it a neceſſary act in the king, in order to preſerve public peace. The latter was the caſe with reſpect to earl Goodwin's family. Edward the Confeſſor hated him mortally for the death of his brother Alfred, as he did his whole family for his ſake. However, as he owed the crown ſolely to his intereſt and intrigues, as he was well acquainted with the power, and knew that he had ſpirit enough to attempt dethroning him, if once offended, that prince, who was careleſs of what came after him, ſo he might reign in peace during life, careſſed Goodwin and his family; diſſembled all reſentment, and, after one or two weak ſtruggles, let him and his family govern the kingdom at their pleaſure: a conduct that raiſed them ſtill higher in the opinions of the people, and concurring with the incapacity of Edgar Atheling, Edward's nephew, raiſed Harold to the throne, as the only man in England capable of defending it againſt two powerful invaders *.

But

* Selden's tit. of Hon. part 2. ch. 5. Hume, vol. 1.

But the great difficulty is to know what kind of *eſtates* the Saxons had in their lands, and by what *tenures* they held them. This queſtion hath divided the lawyers and antiquaries of England; ſome holding that the tenures were as ſtrictly feudal, as after the conqueſt, while others as ſtrongly deny it. I ſhall not, in this difficult point, pretend to decide abſolutely where ſo great maſters differ, but only make ſome obſervations that perhaps would induce one to believe, that the Saxon lands were, in general, *allodial*, ſome of them military benefices for life, and none, or, if any, at leaſt very few feudal inheritances; and this I take to be the truth of the matter.

Firſt, then, the Saxon lands in general, were inheritances, deſcendable to heirs; and were all ſubject to military ſervice. An *Heriot*, which is contended to be the ſame as the Norman *relief*, was paid upon the death of the anceſtor, and all landholders took the oath of allegiance, or of fealty, as they would have it; and therefore, Coke and others conclude that their lands were feudal, and held by knight ſervice; and tho' there are no traces either of *wardſhip* or *marriages* to be met with in thoſe times, they inſiſt that they, as fruits of knight ſervice, muſt have been in uſe tho' from the paucity of the Saxon records remaining, they cannot be diſcovered‡.

This reaſoning ſeems to have great ſtrength, and yet, if we examine with a little attention, perhaps, theſe very arguments, when well conſidered, will prove the contrary, *viz.* that moſt of the Saxons lands were allodial.

Firſt,

‡ 1 Inſt. 76. Bacon on the Government of Engl. p. 75. Saltern de antiq. leg. Brit. c. 8.

Firſt, then, as to their being hereditary: This, ſingly, is far from being a proof of their being held by a feudal tenure. The lands of the Greeks, of the Romans, I may ſay of all nations, except the conquering Germans, nay, the allodial lands in their conqueſts, were hereditary. Their being ſo ſeems rather a proof of their not being founded on the feudal policy; for the military benefices did not become inheritances any great length of time before the conqueſt; whereas there is no ground to believe that the Saxon lands were ever otherwiſe. Beſides, they had ſome qualities that are utterly incompatible with the feudal ſyſtem. They were not only inheritances, but were *alienable* at the pleaſure of the owner, without any leave from the ſuperior, and were, likewiſe, deviſable by will; ſo that the Saxons were abſolute maſters of their land, and not obliged to tranſmit to the blood the donor intended to favour, contrary to the feudal law abroad, and to our law after the conqueſt. I ſhall obſerve, by the way, that ſome lands in England in particular places, being by cuſtom deviſable by will after the conqueſt, was a relict of the old general Saxon law, thoſe places not having, along with the reſt of the kingdom, embraced the feudal maxim†.

Another ſtriking difference is, that the Saxons lands were not forfeitable for felony, which ſtill remains by cuſtom in the *gavelkind* lands in Kent, whence that country proverb, *the father to the bough, and the ſon to the plough.* Their lands likewiſe were equally diviſable among all the ſons, as were gavelkind lands; which is a cuſtomary relict of the Saxon law, contrary to general rule, ſince the conqueſt, where, at firſt, the king choſe one, and afterwards, as at this day, the eldeſt alone ſucceeded. But this laſt I will

† Spelman on Feuds and Tenures, ch. 6.

will not urge againſt their being of feudal origin, for that was the antient law of fiefs; it only ſhews there was a conſiderable alteration introduced at the conqueſt. However, though their being inheritances ſingly will not prove them fiefs, yet, when that is joined to the military tenure, to the payment of reliefs, and to the oath of fealty, we muſt allow them to be ſuch. Let us ſee then, whether any of them, ſingly, or taken all together, will enable us to draw that concluſion †.

Certain it is, then, that all the lands in England were, in the Saxon times, liable to military ſervice; but this will not prove that they were feudal. For, as I have obſerved in a former lecture, the allodial lands in France were ſubject to the ſame. Every man who held land as an allodial tenant, was, according to the quantity, either to find a foot ſoldier equipped for the wars, or to join with another to find one, if he had not land ſufficient. Theſe allodial lands were ſubjected by law to three ſorts of duties. The firſt I have mentioned, the other two were building, and repairing bridges, and furniſhing waggons and carriages for the conveyance of arms and the king's proviſions, or money ‡.

The Saxon lands were, likewiſe, ſubject to what they called *trinoda neceſſitas*, the three knotted obligation. The firſt was, furniſhing a foot ſoldier; the ſecond, which was not in the allodial lands abroad, was *arcis conſtructio* the building and keeping in repair caſtles and forts, where the king, for the public good, ordered them to be erected; and laſtly,

† Taylor and Somner on Gavelkind, and Harris in his Hiſt. of Kent, p. 457.

‡ Spel. gloſſ. voc. Burghbote et Brughbote.

laſtly, *pontis conſtructio* the building and repairing of bridges. As to furniſhing carriages, the Saxon freemen were exempted; theſe being ſupplied, in that conſtitution, by the lower tenants in antient demeſne; or the king had a right to ſeize any man's carriages by his purveyors, and uſe them upon paying for them. This right of purveyance of carriages, and of timber, and of proviſions for the king's houſehold, which was intended for the king's benefit, and by which no leſs was to accrue to the ſubject, as he was to be paid the value, became, in the hands of the greedy purveyors, an occaſion of great grievances; thoſe officers ſeizing, often more than was wanted, often where nothing was wanted, merely to force the proprietor to a compoſition of money on reſtoring them. The manner of payment, too, became very oppreſſive. The rates were fixed at firſt at the due value, but as the rate of money changed, and the prices of things roſe, it came to be under the half, and as it was not paid for on the ſpot, but by tickets on the treaſurer, the owners were frequently put to more trouble and expence in attendance than the value of their demand. This the purveyors well knew, and therefore turned their office into an engine of extortion. Many were the proclamations iſſued by the king; many the acts of parliament made to regulate it; But the evil was inveterate, and proved very heavy even under the beſt princes. The complaints of theſe oppreſſions were as great under Elizabeth as under her ſucceſſor James, and indeed, the evil was ſo inveterate, that nothing but cutting it up by the roots, the deſtroying purveyance itſelf, could cure it‡.

But to return to the military duty done by the Saxons in general for their lands. In the firſt place, then, they ſerved,

‡ Tyrrel's Introd. p. 120. Spel. Reliq. p. 22.

ed as foot ſoldiers, and not on horſeback, and in compleat armour, as the feudal tenants were obliged. Again, the feudal tenants attended not but when called upon, whereas, the Saxons had regular times of meeting and muſtering, though not ſummoned, in order to ſee that the men were well trained, and properly armed. But the great difference lay in this, that no particular perſon was bound to military duty, in conſideration of his tenure in the lands. The lands themſelves were liable. Every hide of land found a man, whether it was in the hands of one, or more perſons. There was then no perſonal attendance, and, conſequently, no commutation for it. The hide of land ſupported its ſoldier, while he continued fighting in his own county; but if in another, he was to be maintained either by that county, or the king; whereas, the military tenants, by the feudal law, were obliged to ſerve forty days at their own expence, wherever the king pleaſed, if the war was a juſt, or a defenſive one; and indeed, as William the Conqueror modelled it, if the war was even unjuſt, or offenſive. Theſe differences, added to what I have already obſerved, concerning their lands not being eſcheatable for felony, being alienable, and being deviſable by will, I think, ſhew plainly that, though the lands were ſubject to military ſervice, it was upon grounds and principles very different from the feudal ones, and that they were rather in the nature of the allodial lands on the continent.

As to *Herriots*, which Coke and his followers inſiſt much upon, as being *reliefs*, they alſo, when thoroughly conſidered, will, perhaps, be found to be of a different nature. A Herriot was a title the landlord had from his tenants, and the king, as ſupreme landlord, from his, of ſeizing the beſt

beſt beaſt of his dead tenant, or his armour, if he was a military man. Theſe being due upon the death of the tenant, certainly bore ſome reſemblance to the reliefs on the continent, and are in king Canute's law, which was written in Latin, called by the name of *relevatio*. To ſhew what they were in that time, the *relevatio*, or Herriot of an earl, was eight horſes, four ſaddled, four unſaddled, four helmets, four coats of mail, eight lances, eight ſhields, four ſwords, and two hundred marks of gold; of the king's thane four horſes, two ſaddled, two unſaddled, two ſwords, four lances, four ſhields, his helmet and coat of mail, and fifty marks of gold; of the middling thane, a horſe with his furniture, with his arms. But, then, Spelman juſtly obſerves, that theſe were not paid by the heir, as a relief to the lords, to entitle him to enter on the inheritance. The heir had the lands immediately and was not obliged to defer his entry till he had paid them, as he was his relief by the feudal law, and by the law of England after the conqueſt. Nay, they were not paid by the heir at law, but by the executor or adminiſtrator, as a perquiſite out of the tenant's perſonal fortune†.

However, William the Conqueror, finding theſe perquiſites in uſe, and that in Latin they were called *relevationes*, took advantage thereof, and as the forfeited lands he beſtowed on his Normans were given upon the terms, and with the ſame burthens as lands on the continent, ſo were the reliefs he exacted from ſuch in the ſame manner, made payable by the heir, not the executor; and as to the unforfeited lands, which remained to the Saxons, and were very inconſiderable in number, he, in the manner I ſhall ſhew in the next lecture, converted them, into real fiefs, ſuch as were then in uſe in France; from whence the reliefs came, likewiſe, to be exacted from the heir, and to be con-

† Dr. Brady's Gloſſary to his Tracts, p. 3. Spelman on Feuds and Tenures, p. 17, and 18.

ſidered as redemptions of the inheritance, which, upon the principles of the feudal policy, could not be entered upon by the heir till the relief was paid. This alteration it was not in the Saxon landholders power to oppoſe, on the account before-mentioned; nor, indeed, was the burthen on the heir ſuch, if no conſequences were to be apprehended from it, as deſerved oppoſition; for William fixed the reliefs at a certainty, at the ſame rate, or with very little addition, as the Herriots were in Canute's law.

But experience ſoon ſhewed what effects might follow from the conſtruction of Norman judges, at the devotion of a king, upon the word *relevium* being uſed, and its becoming payable by the heir, inſtead of the executor; his ſon and ſucceſſor inſiſted that reliefs were by the feudal law arbitrary, and looked upon his father's limiting them as a void act, that could not bind his ſucceſſors. He, accordingly, exacted arbitrary and exceſſive reliefs both from the Norman and Saxon landholders in England, which exaſperated both equally againſt him; for though the reliefs in France were, by no law, as yet reduced to a certainty, yet by cuſtom they were to be reaſonable, and not to be merely at the will and diſcretion of the king or lord; in conſequence of which he was, on ſome occaſions, forced to depend almoſt entirely, in his wars with Normandy, on the mercenary army of the lower Engliſh, who had no property; and had his reign continued much longer, it is extremely probable he would have felt ſeverely for the oppreſſions he laid his military tenants of both nations under. But he dying in ten years, Henry was obliged, before he was elected, to ſwear to obſerve the laws of Edward the Confeſſor, which he did, with ſuch emendations as his father the Conqueror had made; and accordingly, as to *reliefs* he faithfully obſerved his oath; but it being inconvenient for the heir, who was

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at a call to perform military duty, to be obliged to pay his relief in arms, which he might want on a ſudden emergency, it was therefore, generally commuted for money. However, there being no ſettled rate fixed, at which this commutation ſhould be regulated, this alſo was made an engine of oppreſſion in John's reign, until it was finally fixed at a certain ſum of money, according to the different ranks of the perſons, by *Magna Charta* †.

As to the laſt argument, of the *Oath of fealty* being taken by the Saxons, it is the weakeſt of all. An oath of fealty taken by a feudal tenant, was to his *lord*, whether king or not. It was merely as tenant to him of land, and in conſideration of ſuch, and conſequently the proprietors of land only were to take it. The oath the Saxons took, which is likened to this, was to the king, as king not as landlord, and not at all in conſideration of land; for every male perſon above the age of twelve years was obliged to take this oath among the Saxons, whether he had lands or not. In truth, it was no more than an oath of allegiance to the king, as king, which was common in all kingdoms, and not peculiar to thoſe where the feudal maxims prevailed ‡.

Hence I think I have ſome liberty to conclude, though I do it with due deference, as the greateſt maſters in the antient laws and records of England have been divided in this point, that the very reaſons urged to prove that lands were held in the Saxon times as feudal inheritances, prove rather the contrary, and that they were, in the general I mean, of the nature of the allodial lands on the continent.

† Madox, Hiſt. of the Exchequer, vol. 1. chap. 10. § 4.

‡ Spelm. on Feuds and Tenures, chap. 21.

In my next I ſhall ſpeak of the alterations introduced by the conqueror, both as to the tenure of lands in England, and as to the adminiſtration of juſtice, which were ſo remarkable, as to deſerve to be conſidered with the ſtricteſt attention, as they laid the foundation for the great alterations that have followed ſince.

LECTURE XXVIII.

The Saxons, though their lands in general were allodial, were not ſtrangers to military benefices for life—The alterations introduced by William the Norman, as to the tenure of lands in England.

THOUGH, in my laſt, I have delivered my opinion, that the lands of the Saxons were not feudal, but allodial, I would not be underſtood as if there were no lands held by them upon military ſervice, different from the allodial I have already deſcribed. It is undeniable, that there was among them *lord* and *vaſſal*; that there were lands held by ſuch military ſervice as was performed abroad; where the bond of fealty ſubſiſted between lord and tenant, and where the tenants were obliged to ſerve in perſon on horſeback. But theſe were few; for the ſtrength of the Saxon army lay in their infantry. Beſides, ſuch were not feudal inheritances, but benefices for life, for, in all the records remaining of them, there is not a word implying an eſtate that could deſcend, or a ſingle trace of *wardſhip*, *marriage*, or *relief*, the neceſſary concomitants of ſuch eſtates. What puts that out of all doubt, in my apprehenſion, is one of the laws of William himſelf, where he ſays it was he that granted lands *in feudum*, *jure hæreditario*, which words are added, by way of diſtinguiſhing the eſtates he granted from the military eſtates for life, in uſe before. The word *feudum* alone would have been ſufficient, had that law been in uſe before, and the words *jure hæreditario* were added by way of explanation

nation of *feudum*; and *feudum* is added by way of diſtinction from allodial inheritances †.

When theſe military benefices began among the Saxons, I cannot ſay is determined, but ſhall offer a conjecture, that carries a great face of probability. That they were not coeval with the Heptarchy is certain; for none of the German nations had, at that time, fixed eſtates for life in their military holdings. What time, then, ſo probable as the days of Egbert, who had reſided long in the court of Charlemagne, where theſe tenures were in uſe, and where he ſaw the benefit of them? Beſides, this was the very time that a body of horſe began to be wanted, who could move ſwiftly to encounter the Danes, then beginning their ravages, and whoſe practice it was to land in ſeparate bodies, and to kill and plunder, until a ſuperior force aſſembled, and then reimbarking, to commit the ſome devaſtations on ſome other defenceleſs part of the coaſt. But theſe kind of tenures, as I obſerved before, could be but few, as moſt of the lands were inheritances appropriated to particular families.

To come now to William. A ſingle battle, wherein Harold and the flower of the nobility were ſlain, determined the fate of England. However, many of the great men ſurvived, and the bulk of the nation were averſe to his pretenſions. A weak attempt was made to ſet up Edgar Atheling, the only prince remaining of the royal race, but the intrigues of the clergy, who were almoſt univerſally on the invader's ſide (on account of his being under the protection of the pope, and having received from him a conſecrated banner) co-operating with the approach of his victorious army,

† Wright on tenures, chap. 2.

army, ſoon put an end to Edgar's ſhadow of royalty. He ſubmitted, as did his aſſociates, and they were all received, not only with kindneſs but with many high marks of diſtinction. William, accordingly, was crowned with the unanimous conſent of the nation, upon ſwearing to obſerve the laws of Edward the Confeſſor; and it muſt be owned he behaved, during his firſt ſtay, with the utmoſt equal juſtice and impartiality between the Normans and natives. But the continuing to act in that manner did not conſiſt with his views, which were principally two; the firſt to gratify his hungry adventurers with lands, the next to ſubvert the Engliſh law, and introduce the feudal and Norman policy in lieu of it †.

The firſt ſtep he made there was no finding fault with. It was now allowed, that William's title was legal from the beginning, and that Harold was an uſurper, and all that adhered to him rebels. He made enquiry for all the great men that fell in battle on Harold's ſide. Their lands he confiſcated, and diſtributed, upon the terms of the Norman law, to his followers; but theſe were not half ſufficient to ſatisfy the expectants, and the Engliſh were ſtill too powerful, as he had pardoned all thoſe who ſurvived. He therefore returned to Normandy, carrying Edgar and the chief of the Engliſh nobility with him, under pretence of doing them honour, but in reality, that they might be abſent while his views were carrying on; and in the mean time he left his ſcheme to be executed by his Normans, and thoſe he had appointed his regents. I ſay *his* ſcheme, for his intereſt, to exalt one ſide and depreſs the other, on which he could not depend, almoſt forced him to this conduct. The oppreſſi-

ons,

† Hale's hiſt. Com. Law, chap. 5, and 7.

ons, therefore, were ſo exorbitant in his abſence, as muſt neceſſarily have driven a people to repel, and for which a man of juſtice would think the real delinquents ought to be the perſons puniſhed, whilſt the unhappy nation merited the freeſt pardon, for whatever they did when actuated by a deſpair, proceeding from the denial of juſtice. But that he himſelf was the immediate ſource of theſe diſtreſſes is evident from his temper, which was ſuch, that no regents of his durſt have acted as they did without his approbation. The Normans began by encroaching on their neighbours the Engliſh, nay with forcibly turning them out of their entire poſſeſſions. If theſe applied to the regents in the *curia regis*, there was no redreſs. If they retaliated the injuries they ſuffered, they were declared outlaws and rebels †.

Theſe proceedings threw the whole nation into a flame, and, had they had a leader of ſufficient weight and abilities to head them, William, perhaps, might have been dethroned; but the right heir, and all the men he feared, were out of the kingdom. They produced, therefore, only ill-concerted, unconnected inſurrections, headed by men of no conſiderable figure, provoked by private wrongs; and theſe being eaſily ſuppreſſed, afforded a fund of new confiſcations, which he diſpoſed of in the ſame manner as the former, and thereby ſpread the uſe of the feudal law further into ſeveral parts of England. However, though he did not ſpare the inſurgents, nor puniſh his officers that had occaſioned thoſe commotions, he did not, as ſome have aſſerted, ſeize all the lands of England as his by right of conqueſt; for, when he came over, his court was open to the complaints of the Engliſh, and if any of them could undeniably prove, as indeed few of them could, that they had never

† Bacon's hiſt. and polit. diſcourſe, chap, 44, 45. &c. Tyrrel's hiſt.

never aſſiſted Harold, or been concerned in the late diſturbances, they were reſtored to their lands as they held them before; as appears from the caſe of Edwin Sharrburn, and many others. By theſe means William obtained the firſt of his great ends, the transferring almoſt all the lands of England to his followers, and making them inheritances, deſcendible according to the Norman law.

But as to the inheritances that ſtill remained in Engliſh hands, had he not proceeded ſomewhat farther, they would have gone in the old courſe, and been free from the burthen of feudal tenure. But how to alter this, and to ſubject the few allodial lands, as alſo the church lands, to the Norman ſervices, was the queſtion; for he had ſworn to obſerve Edward's laws. The alteration, therefore, muſt be made by the *commune concilium*, or parliament, and this he was not in the leaſt danger of not carrying, in a houſe compoſed of his own countrymen, enriched by his bounty, and who were born and bred under the law he had a mind to introduce; and who could not be well pleaſed to ſee ſome of the conquered nation enjoy eſtates on better terms than themſelves the conquerors. The pretence of calling this aſſembly, which was convened in the fourth year of his reign, was very plauſible. The Engliſh had grievouſly and juſtly complained of the conſtant violation of the Saxon laws, and the only extenuation that could be made for this, and which had ſome foundation in truth, was, that the king and his officers were ſtrangers, and not acquainted with that law. He therefore ſummoned this *commune concilium*, or parliament, to aſcertain what the antient law was, and to make ſuch amendments thereto, as the late change and circumſtances of affairs required. And, for their inſtruction in the old law, which was but partly in writing, moſt of it cuſtomary,

cuſtomary, he ſummoned twelve men, the moſt knowing in the laws of England, out of each county, to aſſiſt and inform them what thoſe laws were.

Accordingly, we find the laws of William the Firſt are, in general, little other than tranſcripts of the Saxon laws or cuſtoms. However, there are two, which were intended to alter the military policy of the kingdom, to aboliſh the *trinoda neceſſitas*, and in its lieu, to make the lands of the Engliſh, and of the church liable to knights ſervice, as the Normans lands were by his new grants, and thereby make the ſyſtem uniform. His fifty ſecond law is entirely in feudal terms, and was certainly drawn up by ſome perſon ſkilled in that law, for the purpoſe I have mentioned. It runs thus: *Statuimus ut omnes liberi homines fœdere & ſacramento affirment, quod intra et extra univerſum regnum angliæ, Willielmo Domino ſuo fideles eſſe volunt, terras & honores illius ubique ſervare cum eo, & contra inimicos & alienigenas defendere* †.

I ſhall make a few remarks on the wording of this law; and firſt on the word *ſtatuimus*. Wright ‡ obſerves, that it being plural, implies that this was not by the king alone, but by the *commune concilium*, or parliament, for the ſtile of the king of England, when ſpeaking of himſelf, was for ages after in the ſingular number, and in the ſubſequent part he is plainly diſtinguiſhed from the enactors of the law; for it is not *mihi*, or *nobis fideles eſſe*, but *Willielmo Domino ſuo* in the third perſon, nor, *terras & honores meos* or *noſtros ſervare*, but *terras & honores illius*; and indeed, in the ſubſequent law I ſhall mention it is expreſsly ſaid in effect,

† L. L. Anglo Saxon, ap. Wilkins, p. 228. Wright on tenures, p. 66. P. 69.

fect, that the ſubjecting the free lands to knight ſervice was *per commune concilium.* Secondly, the words *liberi homines* is a term of the feudal law, properly applicable to allodial tenants, who held their lands free from the military ſervice that vaſſals were obliged to: And in this ſenſe it was uſed in France alſo, from whence William came. In theſe words were included alſo, the men of the church, for as their lands were before ſubject to the *trinoda neceſſitas*, it was reaſonable when that was aboliſhed, they ſhould be ſubject to this that came in the lieu of it. *Fædere* and *ſacramento affirment. Fædus* is the homage, which, though done by the tenant only to the lord, was looked upon by the feudiſts as a contract, and equally bound both parties, as is *ſacramentum*; as appears after the feudal oath of fealty; and they are placed in the order they are to be done, homage firſt and then the oath of fealty. *Willielmo Domino ſuo*, not *regi*, not the oath of allegiance as king, but the oath of fealty from a tenant to a landlord, for the lands he holds. *Fidelis* is the very technical word of the feudal law for a vaſſal. But the words *intra & extra univerſum regnum Angliæ* are particularly to be obſerved: For theſe made a deviation from the general principles of the feudal law, and one highly advantageous to the kingly power. By the feudal law no vaſſal was obliged to ſerve his lord in war, unleſs it was a defenſive war, or one he thought a juſt one, nor for any foreign territories belonging to his lord, that was not a part of the ſeignory of which he held; but this would not effectually ſerve for the defence of William. He was duke of Normandy, which he held from France, and he knew the king of that country was very jealous of the extraordinary acceſſion of power he had gained by his new territorial acquiſition, and would take every occaſion, juſt or unjuſt, of attacking him there; in ſhort, that he muſt be almoſt

almoſt always in a ſtate of war. Such an obligation on his tenants, of ſerving every where, was of the higheſt conſequence for him to obtain; nor was it difficult, as moſt of them had alſo eſtates in Normandy, and were by ſelf-intereſt engaged in its defence.

The next law of his I ſhall mention is the fifty-eighth, which enjoins all who held lands by military ſervice, and ſome others, to be in perpetual readineſs. It runs to this effect: "We enact and firmly command, that all earls "and barons and knights and ſervants, *ſervientes*, (that is "the lower ſoldiers, not knighted, who had not yet got "lands, but were quartered on the abbeys,) and all the "freemen, (namely the Saxon freeholders, and the tenants "of the church, which now was ſubjected to knight ſer-"vice) of our whole aforeſaid kingdom, ſhall have and "keep themſelves well in arms, and in horſes, as is fitting, "and their duty; and that they ſhould be always ready, "and well prepared to fulfil and to act whenſoever occaſion "ſhall be, according to what they ought by law to do for "us from their fiefs and tenements; and as we have enact-"ed to them by the *commune concilium* of our whole king-"dom aforeſaid; and have given and granted to them in "fee in hereditary right." The great effect of this law was to ſettle two things, not expreſsly mentioned in the former; the firſt to ſhew the nature of the ſervice now required, knight ſervice on horſeback; and the other, to aſcertain to all his tenants, Saxons as well as Normans, the hereditary right they had in their lands, for if that had not been done by this law, as now all lands were made feudal, and their titles to them conſequently to

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be decided by that law, they might otherwiſe be liable to a conſtruction, according to its principles, that any man, who could not ſhew in his title *words of inheritance*, which the Saxons generally could not, was but tenant for life †.

This general law then put all on the ſame footing, and gave them inheritances, as they had before, but of another nature, the feudal one, and conſequently, made them ſubject to all its regulations. From this time, and in conſequence of theſe laws, the maxim prevailed, that *all lands in England are held from the king*, and that they all proceeded from his free bounty, as is ſtrongly implied in the word *conceſſimus*; and hence ſome, indeed many, have imagined that the conqueror ſeized all the lands of England, as his by right of conqueſt, and diſtributed them to whom, and on what terms he pleaſed. With reſpect to the greater part, which he gave to his Normans, this is true; but it appears from the records of his time, that it was not univerſally the caſe. The laws I have mentioned ſo changed the nature of the inheritances, which he hid not ſeize, that they were ſubject to all the ſame conſequences, as if he had ſo done; though in truth, with reſpect to the Saxons, he did not diſpoſſeſs them. It was but a fiction in law.

I have mentioned that he made the lands of the church liable to knights ſervice, in lieu of the military expedition they were ſubject to before; but this is to be underſtood with ſome limitation. For where the lands of an eccleſiaſtical perſon, or corporation, were barely ſufficient to maintain thoſe that did the duty, they, for neceſſity's ſake, were exempted;

† L L. Anglo. Saxon. ap. Wilkins. Wright on tenures, p. 72.

exempted; and the Saxon expedition being aboliſhed, the contribution thereto, fell with it, and they became tenants in *frankalmoine*, or *free alms*. But where an eccleſiaſtical corporation was rich, and able, beſides their neceſſary ſupport, according to their dignity, they were, by theſe laws, under the words *liberi homines*, ſubjected to the new ordained military ſervice, as they had been before to the old, and according to their wealth, were obliged to find one or more knights or horſemen. If they were obliged to furniſh as many as a baron regularly was, they were barons, as all the biſhops and many of the great abbots were; and, as barons, ſat in the *commune concilium*; whereas, before, the clergy in general ſat in parliament, as well as the laity, not as a ſeparate body, nor inveſted with ſeparate rights, but both clergy and laity equally concurred in making laws, whether relative to temporal affairs or ſpiritual; though, with reſpect to the latter, it may well be inferred, from the ignorance of the times, that they had almoſt the entire influence. But after this time the clergy became a ſeparate body from the laity, had diſtinct intereſts alſo, and a ſeparate juriſdiction; nay, I may ſay, became, in ſome degree, a ſeparate branch of the legiſlature, by the right they claimed, and exerciſed, of making canons to bind laity as well as clergy †. But the explaining this would carry me too far at preſent, ſo I ſhall defer it to my next lecture.

In the mean time, I ſhall juſt recapitulate the prodigious alteration, as to the properties of landed eſtates in England, introduced by the two laws of the conqueror's, I have mentioned,

† Madox, Baronia Angl. p. 25. Seld. tit. hon. part 2. ch. 5.

tioned, from what was their nature and qualities before that time. They had been the abſolute proprieties of the owner, (I ſpeak in general,) they could be aliened at pleaſure, they could be deviſed by will, were ſubject to no exactions on the death of the owner, but a very moderate ſettled herriot paid by the executor. In the mean time, on the death of the anceſtor, the heir entered without waiting for the approbation of the lord, or paying any thing for it; and his heir, if there was no will, was all the ſons jointly. No wardſhip, or marriage, was due or exacted, if the heir was a minor. All theſe, by the feudal cuſtom's being introduced, were quite altered. Lands could no longer be aliened without the conſent of the lord. No will or teſtament concerning them availed any thing. The heir had no longer a right to enter into his anceſtor's inheritance immediately on his death, until he (not the executor) had paid a relief (and that not a moderate one) and been admitted by the lord. The heir, likewiſe, was not all the ſons jointly, but one, firſt, ſuch as the lord pleaſed to prefer; at length it became ſettled univerſally in favour of the eldeſt; and the fruits of tenure, wardſhip, marriage and relief (for the Saxon herriot was, as I have mentioned, a different thing) came in as neceſſary attendants of a feudal donation.

No wonder, then, that it has been ſaid William introduced a new law, the Norman one. He certainly did ſo as to landed eſtates; but this, as I have obſerved before, by the conſent of his parliament, who, being Normans, were as well pleaſed with the change as himſelf; but it is not true with reſpect to the other old Saxon laws, which did not claſh with the deſign of introducing the military feudal ſyſtem.

ſyſtem. Them he confirmed, and his feudal laws were called only emendations. However, certain it is, his ſecret deſign was to eradicate even the Saxon, the laws he had, in purſuance of his coronation oath, confirmed, and that he took many ſteps thereto; which though they had not the full effect he intended, wrought conſiderable changes. What theſe were, and the conſequences of them, ſhall be the ſubject of the next lecture.

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LECTURE XXIX.

The alterations introduced by William, as to the adminiſtration of juſtice—The Judges of the Curia Regis are appointed from among the Normans—The county courts decline—The introduction of the Norman language—The diſtinction between courts of record, and not of record—The ſeparation of the ſpiritual and temporal courts—The conſequences of this meaſure.

WILLIAM, by altering the nature of land eſtates, and the conditions upon which they were held, had proceeded a good way in his ſecond capital deſign, the introduction of the Norman, and the aboliſhing of the Saxon law. And farther than that, it was not proper nor conſiſtent with his honour, who had ſworn to Edward's laws, to proceed openly. However he formed a promiſing ſcheme for ſapping and undermining the Saxon law by degrees. Firſt, he appointed all the judges of the *curia regis*, from among the Normans, perſons fond of their own law, ignorant of the Engliſh, and therefore incapable, even if they had a mind, to judge according to it.

Before his time this court only meddled with the cauſes of the great lords, or others that were of great difficulty, but now it was thought proper to diſcourage the county courts, and to introduce moſt cauſes originally into the ſuperior court; and for this there was a reaſonable pretence,

from the diviſions and factions between the two nations and the partialities that muſt ever flow from ſuch a ſituation of affairs. The ancient laws of England had been written, ſome in the Saxon, ſome in the Latin tongue, and the laws of William, and of many of his ſucceſſors, were penned in the latter language. But in the *curia regis* all the pleadings henceforward were entered in the Norman tongue, the common language of his court, as were alſo all the proceedings therein, until the time of Edward the Third. This introduced the techncial law terms and with thoſe came in the maxims and rules of adminiſtering juſtice belonging to that people, which gradually, wherever they differed from, ſuperſeded the Engliſh. Hence proceeded the great affinity I may ſay, identity, between the antient law of Normandy, as ſet forth in the *coutumier* of that country, and the law of England, as it ſtood ſoon after the conqueſt.

The analogy, however, did not ariſe from this alone. Though England borrowed moſt from Normandy, yet, on the other hand, Normandy borrowed much from England. William, for the eaſe of his people, who had occaſion to frequent his court, or had ſuits in the *curia regis*, eſtabliſhed ſchools for inſtructing perſons in this language, and obliged parents of ſubſtance to ſend their children thither, which had the conſequence of aboliſhing the old Saxon tongue, and forming a new language, from the mixture of both*.

This introduction of a new language, together with the exaltation of the *curia regis* and the conſequent depreſſion of

† Dugdale's orig. jurid. c. 34. Madox, hiſt. of Exchеq. ch. 2. La coutume de Normandie.

of the county courts, introduced, as I apprehend, the diſtinction between the *courts of record*, and *not of record*, and made the county courts conſidered of the latter kind. Courts of record are ſuch whoſe proceedings are duly entered, which, at that time, was to have been done in the Norman tongue, and which proceedings are of ſuch weight, as, unleſs reverſed, for ever appearing from the record, can never be gainſaid or controverted. Now, to allow ſuch a privilege to the proceedings of the inferior courts, the county ones, where the ſuitors were judges, and where, beſides, the proceedings were in the Engliſh language, would have been contrary to the policy of that time, and would have tended rather to the confirmation than depreſſion of the old law. The ſpiritual courts, alſo, are not allowed to be courts of record, and that, I preſume, becauſe they were antiently a part of the county courts, and ſeparated from them, as I ſhall ſhew preſently in this reign, and therefore could have no greater privilege than the court from which they were derived. However ſome inferior courts, ſuch as the *tourn*, and the leet, were allowed to be courts of record, and that, I conceive, both for the benefit of the realm, and the profit of the king; for theſe were criminal courts, where public offences were puniſhed, and therefore ſhould have all weight given them, and where the king's forfeitures and fines for crimes were found.

I have obſerved before, that the courts, in the Saxon times, were mixed aſſemblies, where the biſhop and ſheriff preſided, and mutually aſſiſted each other, and where the biſhop, I may add, had a ſhare in the amerciaments and fines. But in this reign the ſpiritual and temporal courts were ſeparated by William, a thing which afterwards was of bad conſequence to many of his ſucceſſors,

but was, at the time, very ſerviceable to the view he then had. This was certainly done partly to oblige the pope, who had eſpouſed his title, and at this time was ſetting up for the univerſal lord of churchmen, though, in after times, they carried their pretenſions much higher ‡.

One great engine the popes ſet on foot to attain the power they aimed at, was to make a diſtinction between *clergy* and *laity*, to have the matters relating to the former, as well the merely ſpiritual as the temporal rights they had acquired, cognizable only in their own juriſdictions; and, to preſerve the diſtinction ſtronger, to forbid their interfering in the temporal courts, upon pretence of their time being taken up in ſpiritual exerciſes, and particularly, that it ſuited not the piety and charity of a clergyman, even by his preſence, to countenance the proceeding to ſentence of death, or the mutilation of limbs. Many were the laws they made for this purpoſe, upon motives of pretended piety; and the circumſtances and practices of the times contributed greatly to their ſucceſs. The emperors, kings, and great lords, had the nomination to biſhoprics, and other benefices, as their anceſtors had been the founders, and their lands were held from them. But ſhameful was the abuſe they made of this power. Upon pretence of the clergy being their beneficiary tenants, according to the principles of the feudal law, they exacted reliefs, and arbitrary ones from them before inveſtiture, or, to ſpeak in plain terms, they ſold them on Simoniacal contracts to the higheſt bidder, as the Conqueror's ſon William did afterwards in England; ſo that the profligate and vicious were advanced to the higheſt dignities, while the conſcientious clergy remained in obſcurity; nay, if they could get no clergyman

‡ Baron Gilbert's hiſt. of Excheq. p. 55. Lord Littleton's hiſt. of Henry II, 4to. vol. 1. p. 43. 457. Carte, vol. 1. p. 419. 420.

clergyman to come up to their price, they made gifts of the title and temporalities to laymen, nay, to children; it was a matter of little concern that there was no one to do ſpiritual office.

Such practices, (and they were too common) gave juſt and univerſal offence to all ſober perſons, ſo that the popes were generally applauded for their aiming at the reformation of the evils, and for the endeavouring, by their decrees, to reform the morals of the corrupt clergy, and to reſtore an elective manner of conferring benefices, though their real deſign was firſt to become the protectors of the clergy, next, their lords and maſters, and then, by their means, to tyrannize over the laity; a plan which they carried into execution with too much ſucceſs. This plan was in the height of its operation in William's reign. The foundation of it had been laid before, as I obſerved, in the many diſtinctions made between clergy and laity, and the prohibiting the firſt, except ſome great ones, from meddling with ſecular affairs, or tribunals. This ſeparation, however, had not yet taken place in England, and it is not a wonder that William, who had peculiar views of his own in it, as I ſhall obſerve, thought it reaſonable to oblige his benefactor the pope, and to conform the conſtitution of this church and nation to that of France, where the clergy were a ſeparate body.

The private views of the king were twofold, the firſt aroſe merely from his perſonal character, his avarice. By the biſhop's ceaſing to be a judge in the temporal courts, he loſt his ſhare of the mulcts or fines impoſed therein, and in conſequence the king's two-thirds of them were increaſed. But his other view lay deeper. To comprehend this,

this, we muſt remember how great was the ignorance of thoſe ages. Scarce a man, except a clergyman, could read or write, inſomuch that being able to read was looked upon as a proof of being in orders. Many even of the greateſt lords could not write their names, but ſigned *marks*; and from this ignorance it was that proceeded the great weight our law gives to *ſealing* above *ſigning* any inſtrument, and that ſealing is what makes it a man's deed. It followed from hence that the laity muſt be groſsly ignorant in point of the laws. Their knowledge could extend no farther than as they remembered a few particular caſes, that fell under their own obſervation; whereas the clergy had the benefit of reading the written laws, and conſulting the proceedings thereon, in the rolls of the courts of juſtice, and they were the only lawyers of the times; inſomuch that it became a proverb, *nullus clericus niſi cauſidicus.*

What methed then could ſo effectually anſwer the king's end of making the Saxon law fall into oblivion, which he could not openly aboliſh, after having ſolemnly ſworn to obſerve it, as the removing from the courts of juſtice thoſe perſons who only knew it, and could oppoſe any innovation his Norman miniſters ſhould attempt to introduce. This policy, however, as artfully as it was laid, had not its full effect; for many of the clergy, unwilling to loſe ſo gainful a trade, appeared ſtill in theſe courts in diſguiſe, as laymen, and at this time it is very probably conjectured that that ornament of the ſerjeant at law's dreſs, the *coiff*, was introduced, and for this very purpoſe of hiding the tonſure, which would have ſhewn them to be clerks. This their attendance, in ſome degree, fruſtrated the ſcheme, and many of the Saxon laws, ſuch eſpecially as were repeated in William's,

William's, kept their ground, but many more were forgotten.

I mentioned that one motive of William's to ſeparate the juriſdictions, was to oblige the pope, to whoſe favour he owed much, yet it ought to be obſerved to his honour, that he maintained the independency of his kingdom with a royal firmneſs. Pope Gregory, commonly called Hildebrand, who was the firſt that ventured ſo far as to excommunicate ſovereign princes, as he did the emperor no leſs than four different times, conceiving William could not ſit ſecurely on the throne without the aid of his ſee, demanded of him homage for the kingdom of England, and the arrears of Peter's pence; grounding his claim of ſuperiority on his predeceſſor's conſecrated banner, and that Peter-pence was the ſervice by which the kingdom was held from the holy ſee. But he found he had a man of ſpirit to deal with. William allowed the juſtice of the demand of Peter-pence, and promiſed to have it collected and paid, not as a tribute, but as a charitable foundation, as in truth it was, to ſupport a college of Engliſh ſtudents at Rome, for the benefit of the Engliſh church. As to *homage*, he abſolutely refuſed it, and declared he held his crown from God alone, and would maintain its independance; and to convince the pope he was in earneſt, he iſſued an edict forbidding, on their allegiance, his ſubjects to acknowledge any perſon for ſovereign pontiff, until he had firſt acknowledged him. So bold a ſtep convinced Gregory, who was already ſufficiently embroiled with the emperor, that this was no fit time to puſh things; and ſo he dropped his project, but without retracting it; for the court of Rome never did in any caſe formally recede from a pretenſion it had once advanced.

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The conſequences of the ſeparation of the eccleſiaſtical from the temporal juriſdiction were many. It naturally occaſioned controverſies concerning the reſpective limits, and theſe gave riſe to the *curia regis* interpoſing in theſe matters, and, by prohibitions, preventing one from encroaching upon the other. The great conteſt was concerning ſuits for benefices, or church livings, which the clergy contended were of *ſpiritual*, and the king's courts, of *temporal* cognizance. And this, indeed, was the great queſtion that, in thoſe days, divided the Chriſtian world abroad. However in England, the clergy were, at length, foiled in this point. But a much greater evil aroſe from this ſeparation. It is a maxim of all laws, that no man ſhould be twice puniſhed for the ſame crime, and this juſt maxim the clergy, in favour of the members of their own body, perverted in a ſhocking manner. If a clerk committed murder, rape, or robbery, the biſhop tried and condemned him to penance; and this ſentence was made a pretence of not delivering him to the temporal courts, to be tried for his life. This was one of the great diſputes concerning the conſtitutions of Clarendon, in Henry the Second's time, between him and archbiſhop Becket †.

At length, about Henry the Third's reign, the limits between the ſeveral juriſdictions were pretty well ſettled, and by ſubſequent ſtatutes, and judicial reſolutions, are confined to the reſpective limits they are now under. Indeed, ſince the reformation, as the credit of the canon law has declined, on account of the dilatory proceedings, and the uſe of excommunication upon every trifling contempt,

† Madox, Excheq. ch. 1. Bacon on the laws and government of England, part 1. ch. 59. and 66. Brady, Carte and Tyrrel.

tempt, the reputation of the eccleſiaſtical courts has greatly fallen, and prohibitions are now iſſued, in many caſes, where they could not have been granted in former times. Yet, if we examine accurately, we ſhall find that theſe great complaints, which, it muſt be owned, are in the general juſt, namely, of dilatorineſs and excommunications, proceeded from the ſeparation of the two courts by William. Before, when the courts ſat together, the ſheriff aſſiſted the biſhop, and by his temporal power compelled the parties to appear, and ſubmit to the ſentence, if they were contumacious againſt excommunication. But when they were ſeparated, the biſhop was left to his ſpiritual arms, merely, excommunication; and as the conſequences of ſuch a ſentence were, in the ſuperſtitious times, looked on as very dreadful, and are really ſevere in law, ſeveral intermediate proceſſes and notices were neceſſary before they proceeded to that extremity; and this gave opportunity to litigious perſons to diſobey every order the court made in a cauſe, until they came to the brink of excommunication, and that way, by repeated contumacies, to ſpin out cauſes to an unconſcionable length. And the want of other arms compelled theſe courts, on very trifling contempts, to enforce their orders by excommunication, which, it muſt be owned, according to its primitive and right uſe, ſhould be reſerved only for flagitious immoralities †.

Another evil conſequence that flowed from this ſeparation of theſe courts, was, that the pope cunningly got his, the canon law, introduced into the eccleſiaſtical courts, which made him the head of the church, introduced appeals to him,

† Hale, hiſt. com. law, ch. 7. Bacon, hiſt. and polit. diſcourſe, p. 129. &c.

him, and in effect, robbed the king of ſo many ſubjects in eccleſiaſtical affairs, whereas, before, though there might be references in caſes of difficulty for advice to Rome, there were no appeals thither. The *curia regis* was to reform eccleſiaſtical judgments, and the eccleſiaſtical, as well as temporal juriſdiction, was the king's.

Another evil conſequence, and it is the laſt I ſhall mention, of this alteration, was the ſetting up two legiſlatures, if I may ſay ſo, in the kingdom. In the antient time all laws were made in the ſame aſſembly, but now, the clergy being ſeparated from the laity, when a parliament was called, the buſineſs became divided; eccleſiaſtical matters, and the taxes on the ~~laity~~ clergy†, were handled in the convocation; as temporal matters, and the taxes on the laity, were in parliament. This contributed to the further claſhing of juriſdictions. For it muſt be owned the convocation exceeded their powers, and made canons about things merely temporal; which, however, they contended to be ſpiritual; and ſometimes contrary to the expreſs law of the land, nevertheleſs they by the ſuperſtitious and ignorant, who knew not the diſtinction between ſuch things, were generally obeyed, and hence from ſuch ſubmiſſion it is, that, by cuſtom, in ſeveral places, tythes are payable of things that are not tythable at common law.

The right of the convocation's canons binding the laity in ſpiritual matters was never doubted in the times of popery, nay till Charles the Firſt's time, if they had the approbation of the king, who was the head of the church, it was the general opinion, except among the Puritans. But ſince that time their juriſdiction is ſettled on a reaſonable footing. Their canons bind no man, ſpiritual or lay, in temporal matters

† Clergy

matters. They bind no layman in ſpiritual matters; but they bind the clergy in ſpiritual matters, provided that no right of the laity is thereby infringed. As for inſtance, there is a canon forbidding clergymen to celebrate marriage out of canonical hours. This doth not bind even a clergyman, for if it did, it would ſtrip the laity of their right of being married at any hour. However it is to be conſidered whether a canon of the convocation is a new ordinance, or only a repetition of the old eccleſiaſtical law. If the latter, it binds all men, ſpiritual and lay, not as a canon, but as the law of the land.

LECTURE XXX.

Robert Duke of Normandy, and William Ruffus, diſpute the ſucceſſion to the Conqueror—The Engliſh prefer the latter—The foreſt laws—The cruelty and oppreſſions of William—The advancement of Henry, the Conqueror's youngeſt ſon, to the crown of England—He grants a charter—The nature of this charter—His diſpute with Anſelm concerning Inveſtitures—The celibacy of the clergy—State of the kingdom under Stephen.

WILLIAM the Conqueror left three ſons, Robert, William and Henry. The eldeſt, Robert, according to the eſtabliſhed rules of the French fiefs, ſucceeded in Normandy, and on account of his primogeniture laid claim alſo to the crown of England; but what right that gave him, might in thoſe days, well be a queſtion. In the Saxon times the rule was to elect a king out of the royal family, and the election generally fell on the eldeſt ſon, though not univerſally; for the line of Alfred reigned in prejudice to the deſcendants of his two elder brothers.—Edred ſucceeded to his brother Edmund, in prejudice of Edmund's two ſons; again, on Edred's death, his ſon was excluded, and Edmund's eldeſt ſon reſigned; and laſtly Edward the Confeſſor was king, though his elder brother's ſon was living. So that priority of birth was rather a circumſtance influencing the people's choice, than what gave an abſolute right of ſucceſſion †.

Another

† Tyrrel's Introduct. to his hiſt.

Another thing, it might be pretended, ſhould determine this point, that is, as William claimed the crown through the will, as he ſaid, of the Confeſſor, he alſo had not a power to bequeath the crown. When, therefore, he was making his will he was applied to on this head, but the approach of death ſeems to make him acknowledge that his only juſt title was his *election*, for though he hated his ſon Robert, and was extremely fond of William, he refuſed to diſpoſe of it by will. He only expreſſed his wiſh that William might ſucceed, and diſpatched him to England, with letters to Lanfranc archbiſhop of Canterbury, requeſting him to influence the election in his favour, and he accordingly was crowned. Indeed, it ſeems a little odd that William, whoſe bad qualities were univerſally known (for he had not one ſingle virtue, except perſonal bravery) ſhould be preferred to Robert, who, with that virtue, poſſeſſed all the amiable virtues of humanity.

That the native Engliſh ſhould prefer any one to Robert is not to be wondered at, as he had, on all occaſions, expreſſed the higheſt averſion to them, but they had no influence in the matter; and it appears, at firſt view, the intereſt of the Engliſh lords, moſt of whom had alſo eſtates in Normandy, to be ſubject to one monarch, and not have their eſtates liable to confiſcation, on taking part with one of the brothers againſt the other. But the intereſt of Lanfranc and the clergy, added to his father's treaſure, which he had ſeized, and diſtributed liberally, bore down all oppoſition; and indeed, it is probable that Robert's diſpoſition, which was well known, operated in his disfavour; for his extreme indolence and prodigality, and his ſcruples of uſing improper means for attaining the moſt deſirable ends (whereas William was extremely active and would ſtick at nothing) made it eaſy for perſons of any penetration to ſee

in

in whoſe favour the conteſt between the two brothers muſt end†.

We have little to ſay of the laws in his time, for he regarded no laws, divine or human, eccleſiaſtical or temporal. He choſe for judges and courtiers the moſt profligate perſons he could find. And one of the great oppreſſions his people laboured under was the extending, and aggravating the foreſt laws. The *foreſts* were large tracts of land, ſet apart by his father for the king's hunting out of the royal demeſnes; and conſequently William his father had by his own authority, made laws, and ſevere ones, to be obſerved in theſe diſtricts for the preſervation of the game, and erected courts to try offenders, and treſpaſſers in his foreſts. The great intention of theſe courts was to fleece his ſubjects, who were as fond of hunting as their ſovereign, by mulcts and fines; and in truth, theſe were the only oppreſſions his countrymen, the Normans, ſuffered under the Conqueror.

But Ruffus flew out of all bounds. He introduced the *lawing*, as it is called, the Hamſtringings of Dogs; nay, he made a law, by his own authority, to make the killing of a deer capital. On pretence of this law he ſeized many of the great and rich, confined them for years, without bringing them to tryal, until he forced them to compound, and to give up the better part of their eſtates. Not content with harraſſing the laity, he laid ſacrilegious hands on the church revenues. Whenever a rich abbey, or biſhoprick, fell vacant, he laid his hands on the temporalities, kept them vacant for years, as he did that of Canterbury

† Carte, vol. I. p. 452, 453.

terbury four years; and even, when he was prevailed upon to fill them, he openly ſet them to ſale in his preſence, and gave them to the beſt bidder. However, in a violent fit of ſickneſs, he promiſed to reform, and did till he recovered his ſtrength, when his reformation vaniſhed. The remonſtrances of his clergy, or the pope, had no effect with him, and, indeed, the circumſtances of the times were favourable. For as there were two popes, one made by the emperor, the other, by the Romans, who diſowned the imperial authority in that reſpect, William acknowledged neither, and each was afraid to drive him into his adverſary's party, by proceeding to extremities.

Theſe enormities raiſed him ſo many enemies among his ſubjects, of all kinds, that Robert had a ſtrong party, and an inſurrection was begun in his favour, which William, profiting of Robert's indolence, eaſily ſuppreſſed, and then invaded him in Normandy, and was near conquering it, as, by a ſum of money, he detached the king of France from the alliance, if he had not been invaded by Scotland, in favour of Robert. He patched up, therefore, a peace with him, ratified by the barons on both ſides, the terms of which were, that the adherents of each ſhould be pardoned, and reſtored to their eſtates, and the ſurvivor ſucceed to the other †.

Thus there was a legal ſettlement of the crown of England made, which ought to have taken place, but did not. For William being accidentally killed in hunting, while Robert was abſent in Italy, on his return from the holy war, Henry the youngeſt ſon, took the advantage, and ſeizing his brother William's treaſure, was crowned the third

† Kennet's hiſtorians, and Carte.

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third day, after a very tumultuous election, the populace threatening death to any that ſhould oppoſe him. The reaſon of their attachment to him was, that he was, by birth, an Engliſhman, and therefore, they hoped for milder treatment from him than they had met from his two Norman predeceſſors. Beſides he had promiſed a renewal of the Confeſſor's laws, with ſuch emendations as his father had made. And in purſuance of this promiſe, as ſoon as he was crowned, he iſſued a charter, containing the laws as he now ſettled them, and ſent copies of it to every cathedral in his kingdom.

Theſe laws were, as to the bulk of them, the old Saxon conſtitutions, with the addition of the Conqueror's law of fiefs, and ſome things taken from the compilations of the canon law. However, with reſpect to the feudal law, he, in many inſtances, moderated its ſeverity. With reſpect to *reliefs*, he aboliſhed the arbitrary and heavy ones which William had exacted, and reſtored the moderate, and certain ones, which his father had eſtabliſhed. With reſpect to the *marriage* of his vaſſal's children, he gave their parents and relations free power of diſpoſing of them, provided they did not marry them to his enemies, for obviating which, his conſent was to be applied for, but then he expreſsly engaged not to take any thing for his conſent; and the *wardſhips* of his minor tenants he committed to their neareſt kindred, that they might take care of the perſons and eſtates of the ward, and account with him for the profits during the minority, upon reaſonable terms. He even, in ſome degree, reſtored the Saxon *law of deſcents*, and permitted alienation of lands. For if a man had ſeveral fiefs, and ſeveral ſons, the eldeſt had the principal one, on which was the place of habitation, only, and the reſt

reſt went among the ſons, as far as they would go; and if a man purchaſed or acquired land (as land might be alienated by the feudal law, with the conſent of the ſuperior lord,) ſuch acquiſitions by the laws of Henry, he was not obliged to tranſmit to his heirs, but might alien at pleaſure †.

This mitigation of the former law was very agreeable to his people, both Engliſh and Normans. The former were pleaſed to ſee the Saxon law ſo nearly reſtored, and the latter, harraſſed with the oppreſſions of William, were glad to have the heavy burthens of their tenures lightened; and indeed, began, by degrees, to reliſh the old Engliſh law, and to prefer it to their own.

To attack the bulk of his ſubjects to him ſtill more ſtrongly, he took another very prudent ſtep. He married Maud the daughter of the king of Scotland, by Edgar Atheling's ſiſter, ſo that in his iſſue the blood of the Norman and Saxon kings were united. But ſtill he was not firmly ſettled, until the affairs of the church, and the right of lay perſons granting inveſtitures of church livings were ſettled. He intended to proceed in the ſame manner that his father and brother had done. He accordingly named perſons to the vacant biſhopricks, and recalled Anſelm, archbiſhop of Canterbury, who had lived in exile during the latter part of William's reign, on account of the then famous diſpute of lay inveſtitures. But Anſelm, adhering to the canons of a council held at Rome, refuſed to conſecrate the biſhops named by the king, and alſo to do him homage for the temporalities of his own ſee, which the king required before he gave him poſſeſſion.

† Hale, hiſt. com. law, chap. 7. Carte, vol. 1. p. 480. et ſeq.

Henry, afraid of detaching from himſelf, and attaching to his brother Robert, the pope and ſo powerful a body as the bulk of the clergy, with ſo popular and high ſpirited a prieſt at their head, was obliged to propoſe an expedient, that he ſhould ſend ambaſſadors to the pope, to repreſent that theſe canons were contrary to the antient law and cuſtoms of the nation, and to endeavour to obtain a diſpenſation for not complying with the canons; and that, in the mean time, Anſelm might enter into the temporalities of his ſee. This propoſal was accepted. But, though the king's deſiring to do that by diſpenſation, which he had a right to do by law, was tacitly giving up his cauſe, the pope knew his own ſtrength, and Henry's weakneſs too well, to grant this favour. He inſiſted on the canons being executed, which produced another quarrel between the king and archbiſhop. The archbiſhop, attended by other biſhops his adherents, went to Rome to complain. The king ſent new ambaſſadors, but all in vain. The pope proceeded to threaten excommunication, which, in thoſe days of ſuperſtition, would have tumbled Henry from the throne, ſo he was obliged to ſubmit, and come to a compoſition. He renounced the nomination and inveſtiture *per annulum & baculum*, reſtored the free election of biſhops and abbots to the chapters and convents, which, as the pope was judge of the validity of ſuch elections, was, in effect, almoſt giving them to him; and, in acknowledgment of his antient right of patronage, was allowed the cuſtody of the temporalities during the vacancy; was allowed to give the *congé d'elire*, or licenſe to proceed to election, without which they could not elect, and was allowed to receive homage from the elect, upon the reſtitution of the temporalities.

Thus

Thus the pope gratified the king with the ſhadow, and gained to himſelf and the church the ſubſtance, and thus, at this time ended, that conteſt in England, which had coſt ſo many thouſand lives abroad, between the pope and emperors. Henry, however, retained a conſiderable influence in the elections, for before he iſſued his *congé d'elire*, he generally convened his nobles and prelates, and with them recommended a proper perſon, who generally was choſen; and this the pope, for the preſent, ſuffered to paſs †.

I have little elſe to obſerve touching the laws in this reign, ſave what pertains to the *celibacy of the clergy*. The popes, aiming at detaching the clergy entirely from ſecular intereſts, had made many canons againſt their marrying, and all the eloquence of ſome centuries had been employed in recommending celibacy. Theſe canons, however, had not their full effect in England; for very many of the ſecular clergy were ſtill married. Anſelm, in a ſynod he aſſembled, enacted a canon againſt them, commanding them to diſmiſs their wives, upon pain of ſuſpenſion, and excommunication, if they preſumed to continue to officiate. Cardinal de Crema was afterwards ſent legate by the pope to England, where, in a general aſſembly of the clergy, he re-enacted the canons againſt their marriages, and preſiding in a lofty throne, uttered a moſt furious declamation againſt ſuch a ſinful practice, declaring it a horrid abomination, that prieſts ſhould riſe from the arms of a ſtrumpet, and conſecrate the body of Chriſt. And yet the hiſtorians aſſure us, that, after conſecrating the euchariſt in that aſſembly, he was found that very night in the ſtews of Southwark, in bed with a proſtitute; which made him ſo aſhamed, that he ſtole privately out of England ‡.

† Carte, and Kennet's hiſtorians.

‡ Kennet's hiſtorians. Hume, vol. 1. p. 243.

Henry, though he had ſubdued Normandy, and kept his brother Robert in priſon, was not without uneaſineſs as to the ſucceſſion to his dominions; for Robert's ſon was an accompliſhed prince, and protected by the king of France, whereas his own bore but a worthleſs character. However, to ſecure the ſucceſſion to him, he aſſembled the barons of Normandy in Normandy, and thoſe of England in England, and prevailed on them to take the oath of allegiance to him as ſuch. But he being ſoon after drowned, the king, in hopes of male iſſue, took a ſecond wife, and after three years fruitleſs expectation, he turned his thoughts to making his daughter Maud his heir, and did accordingly prevail on his nobility to take the oath of allegiance to her as ſucceſſor. But one of the ſteps he took for ſecuring the throne to her, in fact, defeated his ſcheme. He knew that a woman had never yet ſat on an European throne, that Spain, which was the only nation that admitted perſons to reign in the right of females, had never ſuffered the female herſelf, but always ſet up her ſon, if he was of a competent age; if not, her huſband. As to the circumſtances of his own family, his grandſon was an infant, and neither he nor his daughter had confidence in her huſband. He knew that this oath was taken againſt the general bent of his people, and that little dependance could be had on it when he was gone, ſo eaſy was it to get abſolution. His chief dependance was on the power and influence of his natural ſon Robert, who, indeed, did not diſappoint him, and of his nephew Stephen, and of his brother Roger, biſhop of Saliſbury, on all of whom he heaped wealth and honours.

Stephen, thus advanced, began to lift his eyes to the crown. He, as well as his couſin Maud, was a grandchild of the Conqueror, and deſcended from the Saxon kings; and

and he had the perſonal advantage of being a male, and bearing an extraordinary good character. By his ability and generoſity he had become exceedingly popular, and his brother Roger ſecured the clergy in his intereſt. Immediately on his uncle's death, he ſeized his treaſure, which he employed as Henry had done William's, and having ſpread a report that Henry, on his death bed, had diſinherited Maud, and made him his heir, he was crowned in a very thin aſſembly of barons. Senſible of his weakneſs, he immediately convoked a parliament at Oxford, where, of his own motion, he ſwore, not only to rule with equity, but that he would not retain vacant benefices long in his hands, that he would ſue none for treſpaſſing in his foreſts, that he would diſforeſt all ſuch as had been made by the late king, and aboliſh the odious tax of *Danegelt*; conceſſions, which, with the pope's approbation of his title, ſo ſatisfied the people, that all the lords and prelates who favoured Maud, and had kept aloof, and among them Robert her brother, came in, and ſwore allegiance to him as long as he kept theſe engagements; from which conditional oath they expected he would ſoon releaſe them, and indeed they did all they could to provoke him to it. This bait taking, and he having diſobliged his brother and the clergy, Maud's friends roſe in her favour; and made the kingdom for many years a field of blood †.

In one of theſe battles Stephen was taken, and Maud was univerſally acknowledged; but her inſufferable haughtineſs, her inflexible ſeverity to her captive, and her haughty refuſal of the city of London's requeſt, to mitigate her father's laws, and reſtore the Saxon, ſo alienated the people from her, that ſhe was forced to fly from London, and arms were

† Bacon, hiſt. and polit. diſc. p. 103, &c. Carte, vol. 1. p. 525. et ſeq.

were again taken up for Stephen. Her brother, who was the ſoul of her cauſe, being ſoon after taken priſoner, was exchanged for Stephen, and he dying ſoon after, Maud was forced to leave the kingdom to her competitor. However, Stephen continuing ſtill embroiled with the clergy, her ſon Henry, in a few years after, invaded England, and was joined by multitudes; but ſome noblemen, who loved their country, mediated a peace, and at laſt effected it on the following terms; that Stephen ſhould reign during life; that Henry ſhould ſucceed him, and receive hoſtages at the preſent for the delivery of the king's caſtles to him on Stephen's death; and that, in the interim, he ſhould be conſulted with on all the great affairs of the kingdom; and this agreement was ratified by the oaths of all the nobility of both ſides. In this treaty no mention was made of Maud's title, though ſhe was living †.

† Kennet's hiſtorians.

LECTURE XXXI.

Henry II. *ſucceeds to the crown—The reformation of abuſes—Alterations introduced into the Engliſh Law—The commutation of ſervices into money—Eſcuage or Scutage—Reliefs—Aſſizes of novel diſſeiſin, and other aſſizes.*

UPON Stephen's death, Henry the Second ſucceeded, according to the ſettlement of the crown before made, and came to the poſſeſſion of the kingdom with greater advantages than moſt kings ever did. He was in the flower of youth, had an agreeable perſon, and had already given the moſt convincing proofs both of wiſdom and valour. He was by far the moſt powerful prince of his time: For, beſides England, which then united to its king in affection, was, by the greatneſs of its royal demeſnes, and the number of knights fees, incomparably the mightieſt ſtate in Europe, in proportion to its extent; he had in France, where he was but a vaſſal, greater territories than the king of France himſelf. In him were united three great fees, to each of which belonged ſeveral great dependancies; Anjou, which came from his father; Normandy from his mother, and Guienne by his wife. And, from the very firſt ſteps he took on coming to the throne, his ſubjects had good foundation to hope that this great power would be principally exerted to make them happy. The whole reign of Stephen, until the laſt pacification, had been a ſcene of diſmal confuſion, in which every lord of a caſtle

caſtle tyrannized at pleaſure, during the competition for the crown; and though, from the time of the ſettlement of peace, Stephen publiſhed edicts to reſtrain violence and rapine, and made a progreſs through the kingdom, in order to re-eſtabliſh juſtice and order, he lived not long enough to ſee his good intentions anſwered, but left the work to be accompliſhed by his ſucceſſor.

The firſt thing Henry did was to diſcharge a multitude of foreigners, whom Stephen kept in arms during his whole reign. His next care was the reformation of the coin, which had been greatly debaſed. He coined money of the due weight and fineneſs, and then cried down the adulterated which had, in the late reign, been counterfeited by the Jews, and the many petty tyrants in their caſtles. Theſe to humble, and make ameſnable to law, was his next concern. As to the caſtles in private hands, that had been erected in his grandfather's time, or before, he meddled not with them; but all that had been built during Stephen's reign, either by permiſſion or connivance, through the weakneſs of that prince, which were the great nuiſances, he iſſued a proclamation for demoliſhing, except ſome few, which, from their convenient ſituation, he choſe to keep in his own hands, for the defence of the realm. And, laſtly, as the crown had been greatly impoveriſhed by the alienations Stephen had, through neceſſity, been forced to make, he iſſued another, to renounce all the antient demeſnes that had been ſo alienated, that he might be enabled to ſupport his dignity without loading his people, except on extraordinary occaſions †.

Theſe reformations, however juſt in themſelves, or agreeable to the ſubject, he did not proceed on merely by his

† Hale, hiſt. com. law, chap. 7. Carte.

his own authority. He had deliberated with the nobles, who attended at his coronation, concerning them, and had their approbation; and though there were no acts of parliament made at that time, yet, as form in thoſe days was leſs minded than ſubſtance, theſe edicts had the obedience of laws immediately paid them by all, except ſome mutinous noblemen, who ſtill held their caſtles in a ſtate of defence. Having taken theſe prudent ſteps, he formed his privy council of the beſt and wiſeſt men of the nation, and by their advice ſummoned a regular parliament, wherein many good regulations were made. The laws of the Confeſſor, as amended by Henry the Firſt, were re-eſtabliſhed, and every thing, both in church and ſtate, ſettled on the footing they were in the time of that king. Being thus armed with a full parliamentary authority, he marched againſt his mutinous nobles, whom he ſoon brought to ſubmit; and demoliſhed their caſtles.

In another parliament, in order to ſettle the ſucceſſion, conteſts about which had had fatal effects ever ſince the death of the Conqueror, he prevailed on his ſubjects to take the oath of allegiance, to his two ſons, though both in their infancy, firſt to William, then, to Henry, as his ſucceſſors. And having taken all theſe wiſe and juſt meaſures, for the peace and ſecurity of his kingdom, he repaired to his foreign dominions; but his tranſactions there, or even at home, that do not relate to the laws or conſtitution, are not within the compaſs of the deſign of theſe lectures. Let it ſuffice to ſay, that he made as good laws for, and was as good a ſovereign to, his French as his Engliſh ſubjects.

In

In his reign many were the alterations introduced into the Engliſh law, moſt of them, no doubt, by act of parliament, though the records of them are loſt. For, in the beginning of his reign, as I obſerved, he enacted in parliament the laws of Henry the Firſt; and yet from the book of Glanville, written in the latter end of his reign, it is plain there were great changes, and the law was very much brought back to what it was in the Conqueror's reign; nay, in one reſpect, to what it was in Rufus's, I mean reliefs, the law of which I ſhall mention hereafter. Many likewiſe were the regulations he introduced of his own authority, which in the event proved very beneficial to his ſubjects.

The firſt I ſhall take notice of was his commutation of the ſervices due of his tenants in demeſne, which formerly were paid in proviſions and other neceſſaries, into a certain ſum of money, adequate to the then uſual price. His grandfather Henry did ſomewhat of this kind, but he it was that eſtabliſhed and fixed it; and his example was followed by his lords, ſo that, from this time, rents became generally paid in certain yearly ſums of money, inſtead of corn and proviſions. What advantage the ſucceſſors of theſe ſocage tenants gained thereby will be evident, if we conſider the price of things at or about that time. In the reign of Henry the Firſt, we are told, the current price of ſeveral commodities, which, however, muſt be trebled when reduced to the money of our ſtandard, were as follows: That of a fat ox five ſhillings, of our money fifteen; a wether four-pence, of ours, a ſhilling; wheat to ſerve an hundred men with bread for one meal, a ſhilling, of ours, three ſhillings; a ration for twenty horſes for a day, four-pence, of our money a ſhilling. And although we ſhould allow that, in Henry the Second's time, the prices of things were even

even doubled, which is impoſſible to be admitted, it is eaſy to ſee how greatly the future ſocage tenants, paying the ſame nominal rent, the value of which was daily decreaſing, roſe in wealth and importance. Beſides, they were greatly eaſed in point of the expence and trouble of carrying the proviſions to the king's court, to which before they were obliged, wherever he reſided in England; whereas, now, they had only to carry, or ſend by a proper meſſenger, the money to be accepted as an equivalent †.

His military tenants he eaſed in a much more conſiderable manner. By the law of the Conqueror, every military man was obliged to ſerve at his own expence for forty days as well abroad, where the king's occaſions required, as in England, and in perſon too unleſs notoriouſly incapable; in which caſe they were obliged to find each a deputy, and if they failed herein, by the ſtrictneſs of the feudal law, they forfeited their lands, or rather, as the law was uſed in England, compounded at the king's pleaſure; which, if he was very avaricious, came pretty near the ſame thing. This was a miſerable heavy grievance. For what oppreſſion muſt it be for a knight of Northumberland, who had, perhaps, but a ſingle fee, to tranſport himſelf, it may be, to Guienne, to ſerve forty days, and then return? Nay, it was inconvenient to the king himſelf; for as France, where the ſcene of the king of England's wars generally lay, was every where full of fortifications, it was ſcarce poſſible to finiſh a war in forty days, however great the humour of that age was for pitched battles; the conſequence of which was, that, after that time, the king was ever in danger of being left in the midſt of a campaign, with an inferior army.

Henry

† Gervaſ. de Tilbury, dial. de Scaccario.

Henry then, ſenſible of theſe inconveniencies, both to himſelf and his ſubjects, deviſed *eſcuage*, or *ſcutage*, in the fourth year of his reign, upon account of his war with Toulouſe upon which his wife had ſome pretenſions. He, knowing that this war required but a ſmall part of his force, did, both in Normandy and England, publiſh, that ſuch of his military tenants as would before-hand pay a certain ſum of money, ſhould be excuſed from ſerving, either in perſon or by deputy; and this ſum, which was rated by him extremely moderately, and was, therefore, generally paid by his vaſſals, rather than ſerve in ſo remote a place, he employed in hiring mercenary ſoldiers of fortune, of whom there was plenty on the continent; and thoſe by their engagement, were obliged to ſerve during the continuance of the war †.

That his ſole view, in this new project, was the eaſe of his people, and the better proſecution of his wars, and not the depreſſing the military ſpirit of his ſubjects, appears from hence; that thoſe who were qualified, and choſe to ſerve in perſon, he careſſed, and encouraged by all means poſſible; that he never brought a ſingle mercenary into England, when he had wars with Wales or Scotland, but inſiſted on his ſubjects perſonal ſervice; nay, that he never kept thoſe mercenaries on foot in his foreign dominions, but diſmiſſed them as ſoon as the war was at an end. And this of *ſcutage* was the general method he followed in his ſubſequent wars in France and Ireland. What wonder is it then, that this prince was univerſally beloved by his people of all ranks? though, as the beſt inſtitutions are liable to be corrupted, this very ſcutage, that he deviſed for public eaſe, was turned into an heavy engine of oppreſſion by his ſon John.

Another

† Madox, hiſt. of Exchеq. ch. 16.

Another alteration in the law in the reign of this king, was the point *of reliefs*, as I mentioned before. The old relief of William the Firſt, which was reſtored by Henry the Firſt, was certain, to all lords and knights, according to their degrees, and was paid in horſes and arms; but now the humour of the times being that every thing ſhould be paid in money, the relief of a knight's fee was ſettled at one hundred ſhillings, the fourth part of its then computed yearly value, and which I ſuppoſe was about the price of the armour, a knight was before to pay; and henceforward the arms of the deceaſed deſcended to the heir, and conſequently the coats of arms blazoned thereon became hereditary. But the reliefs of barons, or earls, were not ſettled at this time, but remained arbitrary, as Glanville informs us. *De baroniis & comitatibus nihil certum eſt ſtatutum, quia juxta voluntatem et miſericordiam domini regis ſolent baroniæ capitales de releviis ſuis domino regi ſatisfacere* †.

From the word *ſtatutum*, I take it for granted this change of reliefs into money was by act of parliament. Indeed, how could it be otherwiſe; but then, the moſt ſurpriſing circumſtance is, that the great lords, who, in that age, principally compoſed the parliament, ſhould take care in this material point, of the knights, the lower military tenants, and leave themſelves at the mercy of the crown. I ſhall venture on conjecture to aſſign the reaſon. The Conqueror ſettled the reliefs of earls and barons at a certainty, becauſe he had fixed the number of knights fees they ſhould contain; twenty to an earldom, and thirteen and two-thirds to a barony; but by the time of Henry the Second, the number of knights fees contained in them might be greater or leſs. For inſtance, if an earl died, and left two daughters, his twenty fees would be divided equally between them; but

† Lib. 9. c. 4.

but the dignity was to go to the huſband of that daughter the king choſe. Now it would be hard that he ſhould pay for ten knights fees, merely becauſe he had the ſame title, as much as the predeceſſor paid for twenty. Again, in the new created honours, it ſeems very probable, from many circumſtances, that an earldom might be erected but with fifteen knights fees, or, perhaps, with twenty-five. The certainty of the *quantum* of land an earldom or barony ſhould conſiſt of not being ſettled, I imagine, was the reaſon that the *quantum* of relief was not expreſsly determined, though, by fixing that of a knight's fee, the reaſonable relief might, in any caſe, be eaſily determined. And that Henry, and his ſon Richard, exerciſed that diſcretion the law left in them in this equitable manner, we may infer from there being no complaints, as to reliefs, from the earls or barons, during their reigns; but John revived the arbitrary relief of William Rufus, to the great oppreſſion of his nobles, until he was reſtrained by *Magna Charta*.

To no other reign than this, I think, can be aſcribed, ſo properly, the invention of *aſſizes of novel diſſeiſin*, and the other *aſſizes*, for obtaining poſſeſſion of the lands. By the ſtrictneſs of the very antient feudal law, if a man had been diſſeized, that is, turned out of poſſeſſion, if he did not enter, and regain his poſſeſſion, or, at leaſt, claim it within a year and a day, he loſt all right; for, if he was a ſocage tenant, the poſſeſſor had, within that time, paid a rent to his lord, and been by him, who was ſuppoſed the beſt judge, allowed to be the rightful tenant; and, if he was a military one, it was probable, in thoſe ages of perpetual war, he had actually ſerved, at leaſt he had kept himſelf in conſtant readineſs if called upon. But the limitation of a year and a day being ſoon found too ſhort, it was afterwards extended

to

to five years; then, to the time of the poſſeſſion of the diſſeizor himſelf, namely till he had either died or aliened it. But upon the alienèe, or heir of the diſſeizor, he could not enter, becauſe they came in honeſtly, by a fair title, and were guilty of no wrong. However, this antient law, that gave no remedy but by entry, during the ſeizor's poſſeſſion, was ſtill too ſevere; for the *diſſeizor* might alien, or die ſuddenly, before the *diſſeizee* could enter, or he might hold the poſſeſſion *manu forti*, ſo that the diſſeizee might not be ſtrong enough to enter and recover his poſſeſſion †.

To remedy theſe evils, and to prevent bloodſhed, the law provided for the diſſeizee his right of action, either againſt the diſſeizor himſelf, or his heir or aſſigns, and, in which, upon ſhewing his right to the land, he ſhould be reſtored to his poſſeſſion by the king's officer, the ſheriff, with the *poſſe* of the county. But ſtill this action was hitherto but the *writ of right*, which meddled not with the unlawful poſſeſſion, only with the abſolute right to the land, and this action, if brought in the *curia regis*, where only impartial juſtice could be expected, was very dilatory. It was dangerous alſo, as the tenant in poſſeſſion might offer battle. In this reign, then, were theſe *poſſeſſory actions* introduced, for the determining the point of poſſeſſion, leaving the right of property as it was. It was advantageous likewiſe to the ſubject, both diſſeizor and diſſeizee, as it gave him two trials for his lands; for the writ of right when once determined was final and concluſive ‡.

This diſtinction between the *right of poſſeſſion*, and the *right of propriety* was borrowed from the civil law, which was

† Coke on Littleton, fol. 153.

‡ Ibid.

was firſt introduced in the late reign, and was now, and for ſome time forward, ſtudied with great aſſiduity by the Engliſh, as appears from the many long tranſcripts from it to be found in the books of our antient lawyers. There they found the diſtinction of *actions poſſeſſory* and *petitory*; *poſſeſſory* when a man had been notoriouſly in poſſeſſion, and reputed the owner, and was put out by another of his own authority. The public peace was concerned to protect the poſſeſſion of the reputed owner, and not to let him ſuffer the loſs thereof while he was ſuing his petitory action, that is on the mere right, which the other undoubtedly would delay, by all the arts and ſhifts he could invent. The proceedings, therefore, in poſſeſſory actions were ſummary and expeditious; for they only regarded the poſſeſſion, and did not determine the abſolute right: ſo there was no concluſive wrong done to either party, let the matter of poſſeſſion be decided how it would; for he that failed might bring his petitory action for the right.

An *aſſize* in our law was a very ſummary action. Bracton, who lived an hundred years after, calls it *novum & feſtinum remedium*, and indeed ſo *feſtinum* was it, that, in its proceedings, it ſeems to depart from the general rules of reaſon and all laws. For it is a maxim of all laws, except in ſome few very extraordinary caſes, that no proofs are to be taken till an *iſſue* is *joined*, as our law calls it, or till there is a *conteſt*, as the civil law expreſſeth it; that is, till it is ſettled what is the matter to be proved, or till there is ſomething affirmed on one ſide, and denied on the other, upon which the merits of the cauſe turn. If there be no diſagreement about *facts*, but the queſtion is mere *matter of law*, the judges, who are beſt accquainted therewith, are, by our law to determine. If the queſtion be

matters

matters of fact, or facts mixed with law, the jury, aſſiſted with the judges, are to determine; though if they doubt about the point of law, they may find the facts ſpecially, and leave the law ariſing thereon to the judges, which is what we call a *ſpecial verdict*. No jury, therefore, ought to have been ſummoned till the defendant appeared, and iſſue was joined, ſo that it was known what was the matter to be tried; and this is the general rule. But, for the ſpeedy ſettling and quitting poſſeſſions, the aſſize is an exception thereto, as appears from the *writ of aſſize* directed to the ſheriff. For, beſides giving notice to the defendant, or *tenant*, as he is called in this action (becauſe he is in poſſeſſion) the ſheriff is immediately to ſummon a jury or aſſize, as it is called upon this occaſion, who ſhall directly go to the place, and make themſelves judges, by their view, of the nature, quality, and quantity of the land, or thing demanded, and inform themſelves, by all the ways they beſt may, of the former poſſeſſion of the demandant, and how he came to loſe it. They are then to appear the ſame day with the demandant and tenant, and, when iſſue is joined between them, are to determine the matter according to their own prior knowledge, and the evidence then given before them. I obſerved that this action is not final. A brings an aſſize againſt B. If judgment be given for A, B may bring his *writ of right*, if he has the right of propriety, and recover, and ſo *e contra*. But though B cannot deny his diſſeizing A, he may ſtill defend himſelf. The words of the writ are *injuſte, & ſine judicio, diſſeizivit*. He may therefore ſhew that he diſſeized A, juſtly, that is, that he had a right of entry. As, ſuppoſe B was firſt in poſſeſſion, A diſſeizes him; then B, as he lawfully may, diſſeizes A, A ſhall not recover. But if B had been in poſſeſſion, and A's father had diſſeized him, and died, ſo that the land has come to A, who is innocent, B,

not entering in the father's life-time, has loſt his right of poſſeſſion. It is ſo in A. Now if B diſſeizes A, the ſon, though he had ever ſo good a right to the land, A ſhall recover the poſſeſſion; for B had no right to enter, though he had a right to recover the poſſeſſion he was deprived of by A's father, by bringing an action. Wherever a man comes innocently to a poſſeſſion, the law will defend that poſſeſſion, until it is proved that he hath no good right to it †.

† Bracton, lib. 4.

LEC-

LECTURE XXXII.

The inſtitution of Judges itinerant, or Juſtices in Eyre—The advantages attending it—The juriſdiction of theſe Judges—Their circuits—The preſent form of tranſacting the county buſineſs—The diviſion of Curia Regis into four courts—The juriſdiction of the court of King's Bench.

THE greateſt and moſt beneficial ſtep taken by Henry the Second, was the inſtitution of *judges itinerant*, or *juſtices in eyre*, as they were called, from the Norman word *eyre*, equivalent to, and derived from the Latin *iter*. I obſerved before, that almoſt all buſineſſes relative to the adminiſtration of juſtice were, in the Saxon times, tranſacted in the county, and hundred, that the leet and manor courts were held in the county, near the ſuitors doors, and that none but the cauſes of the great lords, or ſuch as were of difficulty, were handled in the *curia regis*. Under the reign of the Conqueror, I took Notice, that the adminiſtration of other cauſes was facilitated in the king's great court; and that, conſequently, the buſineſs of the inferior courts began to decay; and I laid open the motives William had for that conduct, the introduction of the Norman, and ſuppreſſion of the Saxon law. But the ſcheme ſucceeded in the ſame manner as his other one did, of rooting out the Engliſh language, and introducing his own in lieu thereof. As *this* produced a new language, from the mixture of both, ſo *that* cauſed the Engliſh law to conſiſt henceforward partly of feudal, partly of old Saxon cuſtoms.

However, the cauſes of moſt perſons were ſtill determined in the inferior courts; for they were but few who were able to undergo the trouble and expence of ſuing in the *curia regis*, eſpecially, as all perſons, whoſe cauſes did not properly belong to the cognizance of that court, were obliged to pay a fine for declining the proper juriſdiction, and for having licence to plead in the ſuperior †.

But by this time the deciſions of thoſe courts, where the freeholders were judges both of law and fact, had fallen into great and juſt diſrepute, had occaſioned many miſchiefs, and were likely to produce many more. The reaſons, as they are delivered by lord Hale, were principally three: Firſt, the ignorance of the judges in the law: for as the freeholders in general were Saxons, they muſt be ſuppoſed to be entirely ignorant of the feudal law, which was now introduced with reſpect to titles in lands; or, if they did know any thing of it, it is not probable that they would prefer that to their own cuſtoms. Nay, the Norman freeholders could be of little ſervice in this point, conſidering their illiteracy, their education being confined ſolely to arms, as alſo their frequent abſence almoſt every year to attend their lords in war. With reſpect to the Saxon law alſo, it could be little expected that it ſhould be regularly obſerved, now that the clergy, who only were accquainted with it, were removed, and none of the judges could poſſibly know more than an illiterate juryman at this day, who could neither read nor write, might be able to pick up by attending a court held once a month. How inadequate ſuch a knowledge would be, even in thoſe times, when the laws were comparatively few, need not be enlarged on ‡.

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† Hale's hiſt. Com. Law, chap. 7. Dugdale, orig. jurid. p. 27. Hoveden, p. 599.

‡ Hale's hiſt. Com. Law, ch. 7.

IT is true, ſome remedies were applied to obviate the bad conſequences of this ignorance; but they were very ineffectual. It was required that the ſheriff, who preſided, ſhould have ſome ſkill in the laws, but, notwithſtanding, he was ſeldom found to have any; and if he had, it was not very probable, as he was a Norman, that the jury would pay much regard to his direction in giving their verdicts. As a further remedy to this ignorance, by the laws of Henry the Firſt, the biſhop, the barons, and the great men of the court, that is, the king's immediate tenants, were ordered to attend. But the biſhop, in obedience to the canons, applied himſelf ſolely to his eccleſiaſtical juriſdiction; and the others were generally in the king's ſervice; ſo that they could but ſeldom attend, and if they did, they could do but little ſervice, being almoſt bred to nothing but the ſword, and as illiterate as any other ſet of men.

THE next miſchief, and which flowed from the former, was, that this bred great variety of laws in the ſeveral counties, whereas the intention of the Confeſſor in his compilation, and of his ſucceſſors afterwards in theirs, was to have one uniform certain law, common to the whole kingdom. But the deciſions, or judgments, being made by divers courts, and by ſeveral independant judges, who had no common intereſt, or communication together touching the laws, in proceſs of time, every ſeveral county was found to have ſeveral laws, cuſtoms, rules, and forms of proceeding; which is always the effect of ſeveral independant judicatories, adminiſtered to ſeveral judges. And, indeed, this I look upon to be one of the great cauſes of very many local cuſtoms in many parts of England, different from, and derogatory to, the general common law.

BUT the third and greateſt evil, was the frequent injuſtice of

of the judgments given in thoſe petty courts, and every buſineſs of any moment being carried by parties and factions. The conteſt about the crown had been carried on with ſuch violence, that one half of the people, all over the kingdom, were profeſſed enemies to the other; and though both ſides, wearied with war, came into the expedient of Henry's ſucceſſion, and he behaved ſo that there were no factions againſt him, yet as to individuals, the ſenſe of paſt injuries, and the rancour ariſing from thence, ſtill remained. For the freeholders being the judges, and theſe converſing with one another, and thoſe almoſt entirely of their own party; and being likewiſe much under the influence of the lords, every one that had a ſuit there ſped according as he could make parties; and the men of great power and intereſt in the county did eaſily overthrow others in their own cauſes, or in ſuch wherein they were intereſted, either by relation, tenure, ſervice, dependance, or application. True it is, the law provided a remedy for falſe judgments given in theſe courts, by *a writ of falſe judgment* before the king, or his chief juſtice; and in caſe the judgment given in the county court was found to be ſuch, all the ſuitors were conſiderably amerced. Yet this was inſufficient for the purpoſe: For, firſt, it was too heavy and expenſive for many that were aggrieved; next, it was hard to amerce all for the fault of a few, *viz.* the jury, who gave their verdict; and the amercement, though ſometimes very ſevere, being equally aſſeſſed, on all the freeholders, was not a ſufficient check upon the injuſtice of ſome juries †.

The king therefore took a more effectual courſe; and, in his twenty ſecond year, by advice of his parliament, held at Northampton, inſtituted *juſtices itinerant*. He divided the kingdom into ſix circuits, and toevery circuit allotted three judges,

† Fitzherbert, Nat. brev. p. 41.

judges, men knowing and experienced in the laws of the realm, to preſide in ſuch caſes as were of conſequence, and to direct the juries in all matters of law. They were principally empowered to try *aſſizes*, that is, as I explained in my laſt lecture, the rights of poſſeſſion, which had been notoriouſly invaded in the laſt reign; and which, from the countenance of the old parties, could not, even in this reign, be fairly determined in the inferior courts †.

Not that this was their ſole buſineſs; for they had in their commiſſions power to enquire into ſeveral other matters, ſuch, particularly, as the king found, by the advice he had received from the ſeveral counties, to be evils not likely to be remedied in the county courts. Theſe were, before every commiſſion for juſtices itinerant in eyre went out, digeſted under certain articles, called *Capitula Itineris*, or *The chief heads of the eyre* or *circuit*, which ſpecified what actions they were to deal with. Theſe were, in general (for the commiſſions varied at different times, being ſometimes more, ſometimes leſs extenſive) *civil* and *criminal* actions, happening between party and party; actions brought at the ſuit of the crown, either for public crimes, or the uſurpation of liberties, franchiſes, or juriſdiction from the crown, which had been very frequent in the former times of confuſion; and alſo the eſcheats of the king.

The thing I find moſt remarkable is, that, in theſe diſtributions of England into circuits, are omitted ſome counties, (I do not mean Middleſex, where the *curia regis* ſat, or Cheſter, which was a county palatine, for they of courſe were

† Dugdale, orig. jurid. chap. 20. Madox, hiſt. of Exchequer. chap. 3. § 10. Bracton lib. 3. chap. 10, 11. M. Paris, an. 1176.

were not to be included) as particularly Lincoln, in the ſecond eyre; alſo York, in the ſecond eyre, is but one county, whereas, in the firſt, it is two, York and Richmond; as in Lancaſhire alſo, Lancaſter, and Copeland; and Rutland is omitted in both. All which ſhews, that the limits and diviſions of all the counties were not aſcertained with preciſion at that time. The ſecond eyre was inſtituted three years after the firſt, by parliament alſo held at Windſor, and in this there were but four circuits. After theſe two firſt, the king appointed the circuits, and diſtributed the counties at his pleaſure.

The uſual times of their going was once in ſeven years. However, they were not ſtated certainly; for ſometimes, if there was a more than ordinary complaint of want of juſtice, they went every three or four years, and ſometimes, if there was no complaint, they were intermitted beyond ſeven. Neither was the number of judges ſent on the circuits fixed, but alterable at the king's pleaſure.

The determinations in theſe circuits, being under the inſpection of men of integrity and ſkill, were in high eſtimation, and accordingly are ſeveral times quoted by Bracton, as being of as great authority as the deciſions in the *curia regis*; and in conſequence thereof, the buſineſs in the county courts continually declined; juſtice was every day adminiſtered worſe in them, and at length they were confined, except in ſome caſes, to pleas under forty ſhillings. Nay even theſe were, upon application, eaſily removeable by a writ called a *pone*, into the king's courts †.

But as the hopes of obtaining juſtice in the inferior courts waxed every day more faint, it was found neceſſary, during

† 4. Inſtit. p. 184, 226. Hale, hiſt. com. law. chap. 7.

ring the intervals of the eyres, to ſubſtitute other courts in their place. Hence the invention of *juſtices of aſſizes*, of *oyer and terminer*, of *goal delivery*; and the neceſſity of affairs afterwards obliging theſe to be ſent very frequently, it was thought fit, about the end of Edward the Third's reign, to lay aſide the juſtices in eyre, as ſuperfluous, ſince theſe other did their buſineſs, except as to pleas of the king's foreſts, where the *eyres* were continued. And, in proceſs of time, to prevent the enormous expence of bringing juries up to the king's courts, the juſtices of the *niſi prius* were inſtituted, to try iſſues joined in the king's courts, and the verdict ſo found to return to the court from whence the record was brought; which court, on the record ſo found, proceeds to judgment. Theſe are the judges who now tranſact the county buſineſs in their circuits, under the ſeveral commiſſions before-mentioned; and going regularly every year for that purpoſe, the whole buſineſs they tranſact is, in common ſpeech, called *Aſſizes*; that being, in the antient times of their inſtitution, the principal part of their employment, though now ſuch actions are ſcarce ever brought; perſonal actions, which may repeatedly be tried, having ſuperſeded them †.

About this time, alſo, it ſeems that the *curia regis*, the buſineſs there increaſing, was divided, for the more convenient diſpatch thereof, into four courts; and to each its ſeparate juriſdiction allotted. The exchequer, indeed, was in ſome ſort a ſeparate court before, and had its diſtinct buſineſs of the province; and in it the treaſurer, not the *Juſticiarius Angliæ*, preſided, as he did in the other courts. It is not impoſſible that, before this time, they had, in the *curia regis*, ſet apart different days for different kinds of

† 2. Inſtit. p. 24. et. ſeq. 4. Inſtit. p. 162. Selden's notes on Hengham.

of cauſes. But they were all, in one reſpect, the ſame court; becauſe they had the ſame judges, namely, all ſuch nobles as attended the court. But this being found inconvenient, as theſe great men were generally ignorant in law, and buſineſs began to encreaſe, it was found proper to appoint ſettled ſkilful judges, and to divide the court, and appoint each part its ſeparate juriſdiction. However, thoſe limits were not exactly ſettled, or, at leaſt, not exactly obſerved, for ſome time after: For we find in John's reign, that *common pleas*, that is, civil ſuits between party and party, and particularly fines of lands, which are of the ſame nature, were held in the King's Bench; though, on the contrary, we find no pleas of the crown tried in the court of Common Pleas. I ſuppoſe the reaſon was, that the latter being derived out of the former, the king's bench had a concurrent juriſdiction with it, until reſtrained by that branch of Magna Charta, *Communia placita non ſequantur curiam noſtram.* The firſt of thoſe courts in dignity and power, eſpecially while the *Juſticiarius Angliæ* remained, was the *King's Bench*, though of late days the Chancery hath overtopped it. Here, as the king uſed frequently, in the antient times, to ſit in perſon, the king is ſuppoſed always preſent; which is the reaſon why a blow given in this court, upon any provocation whatſoever, is puniſhed with the loſs of the hand, as it is done in the preſence of the king. The proper juriſdiction of this court is cauſes where the king is directly or indirectly concerned, except as to his revenue ‡.

In all *pleas of the crown* therefore, that is, ſuits of the king to puniſh offences, as indictment of treaſon, felony, breach of the peace, are proper ſubjects for this court. He is indirectly concerned in this, that all erroneous judgments, given in the Common Pleas, or other inferior courts, are

‡ Dugdale, orig. jurid. chap. 17.

are here reformed; for the king is concerned to ſee juſtice done to his ſubjects.

Secondly, for the ſame reaſon, this is a proper court to grant prohibitions to courts that exceed their juriſdiction, though this is not particular to the King's Bench, but common to all the four courts.

Thirdly, it hath cognizance of all privileges and franchiſes, claimed by any private perſons or corporations; and if any uſurped upon the king in this reſpect, they are called in, by a *quo warranto*, to ſhew by what title they claim ſuch privileges. Likewiſe where any member of a corporation is disfranchiſed, or removed from, or diſturbed in his office, here ſhall he be remedied. For when a king has given a franchiſe, he is concerned, in honour and intereſt, to ſee that every man entitled, ſhall enjoy the benefit of it.

Fourthly, the king is intereſted in the life, limbs, and liberty of every ſubject. Therefore this is the court wherein appeals, brought by private perſons, of murder, felony, and maim, ſhould be tried; and if any man complains of wrongful impriſonment, this court ſhall, by writ of *habeas corpus*, have him brought into court, with the cauſe of his impriſonment returned; and if the cauſe is inſufficient to diſcharge him, or if the offence he is charged with be bailable, to bail him. Nay, this court, in favour of liberty, hath a power, in all caſes; they may, if they ſee proper, bail a man for crimes that are not ordinarily bailable by common law.

Fifthly, they have a right to hold plea of all the treſpaſſes done *vi & armis*, though brought principally for a private

private reparation to the party; for this action ſavours of a criminal nature, and the king is entitled to a fine for the breach of the peace.

Laſtly, it has cognizance of all perſonal actions brought againſt perſons that have the privilege of this court. The perſons privileged are two, firſt the officers of the court, who are ſuppoſed to be conſtantly attendant thereon, and to whom it would be inconvenient, as well as to the court, to ſue or be ſued elſewhere; and therefore the privilege extends to ſuits brought as well by, as againſt ſuch officers; ſecondly, the priſoners who are in cuſtody of the marſhal of the court, and who are conſequently not at liberty to appear in any other. Theſe therefore can only be ſued here; for the court will, in ſuch caſe, order the priſoner up from their own priſon to make his defence; and, under the colour of this rule, they now, by a fiction, make all ſorts of actions ſuable in this court; for it is only alledging the defendant is in the cuſtody of the marſhal, though in fact he is not, and that is held ſufficient to found the juriſdiction †

I ſhall next proceed to the juriſdiction of the high court of Chancery, the ſecond in antient times, but for ſome ages paſt the firſt court of the realm.

† 4. Inſtitute, p. 70. et ſeq.

LEC-

LECTURE XXXIII.

The juriſdiction of the high court of chancery—The Chancellor, a very conſiderable officer in the Curia Regis—The repeal of letters patent, improvidently iſſued to the detriment of the King or the ſubject, a branch of the juriſdiction of the court of chancery—The chancery, aſſiſtant to the exchequer in matters of the King's revenue—Other branches of the buſineſs of this court.

IN my laſt lecture, having taken notice, that, in the reign of Henry the Second, the *curia regis* and the *Exchequer*, which dealt with the king's revenue, were diſtinct courts, and that there were even traces of the *Common Pleas*, as another court, different from the higher court, the *curia regis*; I took occaſion to treat of theſe ſeveral courts, and the ſeveral limits of their juriſdictions; although the now general opinion be, that theſe courts were not ſeparated till after the barons wars, that is, not until an hundred years later; which opinion, as I conceive, hath, thus far, its foundation in truth, that the preciſe limits of their ſeveral juriſdictions were not perfectly aſcertained, and kept diſtinct till then, though the diviſion had been made before, that is, about the time I am now treating of. For, if it be a good maxim, as my Lord Coke ſays, *boni judicis eſt officium ampliare juriſdictionem*, it is not to be wondered at, that, for ſome time after the ſeparation, the *Juſticiarius Angliæ*, who had the ſole juriſdiction in him before, ſhould retain, in many inſtances, the exertion

ertion of it, where, after the ſeparation, the matter properly belonged to another court.

The maxim, indeed, is, in my opinion, utterly falſe. For where there are ſeparate courts with diſtinct powers, ſurely it is the duty of each court, were it only to prevent confuſion, to keep within their proper limits. However thus much muſt be allowed in juſtification of Lord Coke's maxim, that, as it is too much the inclination of human nature, when in power, to graſp at more than is properly our due, ſo the judges of all courts, and of all nations, have been as little exempt from this infirmity as any other ſet of men. Witneſs the outrageous uſurpation upon the temporal juriſdiction in ancient days, both by the eccleſiaſtical judges in the times of the Pope's grandeur, and by the judges of the conſtables and admirals courts, when ſupported by arbitrary kings †.

The temporal judges, on the other hand, with a firmneſs highly to be commended, have ſucceſsfully not only reſiſted theſe encroachments, but, by way of reprizals, have, in theſe latter days, made conſiderable inroads into antiently the allowed territories of thoſe courts; not to the detriment of the ſubject, I muſt confeſs; for the method of trial by the common law, is certainly preferable to theirs. But the common law courts have not ſatisfied themſelves with extending their juriſdiction, in derogation of thoſe courts, which they juſtly looked on, in thoſe days, as enemies to them, and to the laws and conſtitution of the kingdom, but they have made invaſions into each others territories, and, by what they call *fictions of law*, have made almoſt all cauſes, except criminal ones, cognizable in any court; contrary to the very intention of dividing the courts; which was,

† D' Anver's abridgement, vol. 2.

was, that each ſhould have their ſeparate buſineſs, and that the judges and practitioners, by being confined in a narrower track, ſhould be more expert in their different provinces ‡

In treating of theſe courts, I began with the *King's Bench*, which, as long as the office of *Juſticiarius Angliæ* ſubſiſted, was the ſuperior; but ſince Edward the Firſt diſcontinued that office, on account of its too great power, and the buſineſs of that officer hath been ſhared between ſeveral judges, the rank of this court hath declined, and the *Chancery* hath obtained the firſt place. To this court, then, I ſhall now proceed. And as in it there are, at preſent, and have been for ſome ages, two diſtinct courts, one *ordinary*, proceeding by common law, and the other *extraordinary*, according to the maxims of equity, where common law could give no relief; I ſhall, for the preſent, confine myſelf to the former, and defer treating of the latter, until I come to that period when the *Equity juriſdiction* aroſe.

In the antient times, before the diviſion of the courts, the chancellor was a very conſiderable officer of the *curia regis*. It was his buſineſs to write and *ſeal* the *diplomata*, or *chartæ regis*, what we now call *letters patents*; to iſſue all writs, either for founding the juriſdiction of the *curia regis*, and the bringing cauſes into that court, that by the antient law belonged to the courts in the country; or thoſe to the nobles, to ſummon them to attend the *commune concilium*, or parliament. Afterwards, when the Houſe of Commons was formed, he iſſued writs to the proper places, for the election of the members thereof. Hence, when the courts were divided, the making out letters patents, the keeping the

‡ 4. Inſtitue, p. 79.

the inrolments thereof, and iſſuing of *original writs*, as they are called, that is, thoſe that found the juriſdiction of courts, and other writs of like nature, continued to belong to him; and, as theſe records remained with him, there aroſe to him a juriſdiction concerning them; except as to ſuch writs as were intended to found the juriſdiction of another court, which, though iſſued from Chancery, were returnable into the proper court, and the cauſe determined there †.

The firſt branch of the juriſdiction of this court, then, was the repeal of the letters patents, that had iſſued improvidently, to the detriment of either the king or the ſubject; and this properly fell to the lot of the chancellor, as he made out the patents, and kept the enrolments of them. The method of repealing thoſe was by a writ called *ſcire facias* notified to the party claiming under the patent, and calling him in to ſhew cauſe why it ſhould not be revoked. This *ſcire facias* iſſued in three caſes: the firſt, at the ſuit of a ſubject; where two patents were granted to two perſons of the ſame thing, the firſt patentee brought a *ſcire facias* againſt the ſecond, to repeal his grant; the other two were at the ſuit of the king, where the king was deceived, either by falſe ſuggeſtions of merit, or as to the value of the thing granted; or in the ſecond place, if the king had, by his patent, granted what by law he could not have granted. Here, if the caſe was clear in law, and there was no controverted matter of fact neceſſary to be ſettled, to aſcertain the right, the chancellor was judge; and if his judgment was againſt the patent, it was his duty to *cancel* the inrolment thereof; from which part of his office he had his name. I ſay if the caſe was clear in law, and there was no

† Dugdale, orig. jurid. ch. 16. 4. Inſt. p. 80.

no controverted matter of fact; for, if this latter was the caſe, he could not try it, he being antiently but an officer of the *curia regis*, and not a judge; and therefore unqualified to ſummon a jury. The rule continued the ſame after the ſeparation of the courts, and his becoming a judge; principally, as I conceive, for the preſervation of the common law, and the birth-right of Engliſhmen, the trial by jury. For, as the chancellor was almoſt always, in thoſe days, an eccleſiaſtic, and conſequently ſuppoſed more attached to the *civil* and *canon law*, there might be danger, if he was ſuffered to try matter of fact himſelf, he might introduce a new method of trial. When, therefore, the cauſe was heard upon a *demurrer*, that is, the facts admitted of both ſides, and only the law in diſpute, he gave judgment; but if they came to iſſue on a fact, he muſt carry the record over to the King's Bench, who ſummoned the jury, and gave judgment on the verdict †.

Another branch of his juriſdiction was with relation to the inquiſitions of office. There are many officers whoſe duty it is to take care of the profits and revenues of the king, and to that purpoſe they are ſworn in the Exchequer; ſuch as *eſcheators*, *ſheriffs*, and others, whoſe duty it is to make enquiry what the king is entitled to in their reſpective limits, whether lands or chattels, or by what title. For this purpoſe they are to ſummon juries, and to return the verdicts found to the court of the revenue of the Exchequer, in order that that court may take care of the king's rights. Theſe were called *inquiſitions*, or *enquiries*, *of office*, as proceeding from the duty of an officer that made them. But theſe officers being negligent in the performance of this their duty, it became ſometimes neceſſary, and afterwards cuſtomary, to quicken them, by iſſu-

† 4. Inſt. p. 79. 80. 84. 88.

ing writs for this purpoſe; and theſe writs iſſued out of Chancery, the *Officina Brevium*; and then, that it might be ſeen they were properly obeyed, the return of the inquiſition was made into the court tha iſſued the writ, and thus, the Chancery gained a juriſdiction in this point, and became an aſſiſtant to the exchequer in the matters of the king's revenue; not indeed in the adminiſtration thereof, but in bringing it into the king's poſſeſſion ‡.

It is a maxim in the Engliſh law, that nothing can paſs from the king to a ſubject but by *matter of record*, which maxim was not only advantageous to the royal eſtate, as preventive of perſons getting grants by ſurpriſe, but alſo advantageous to the ſubject in the firmneſs of his title, when once he had obtained it. And, on the contrary, the regular and equal way of reſtoring poſſeſſions to the crown was by record alſo, that is, by inquiſitions finding the king's title returned, as I have mentioned. But as the verdicts taken in theſe inquiſitions may be erroneous, and detrimental to another perſon, by finding what was really his property, to have been the property of another, and to have accrued to the king by forfeiture or eſcheat; and as, regularly by another maxim of law, there is no averring againſt or conteſting a record, it was neceſſary that the bare return of inquiſition into Chancery ſhould not be final and concluſive, but that time ſhould be given to any that thought himſelf affected to claim his right. Hence a month's time is given by ſtatute, after the return of the inquiſition, in which any perſon may come in and *traverſe the office*, that is, conteſt the validity of it. And here the chancellor is judge, in the ſame manner as in the repeal of letters patents, that is, if the ſubject of the controverſy

‡ Ibid. p. 225. 113. 80. 76.

troverſy depends merely upon matter of law; but if the parties come to an iſſue on matter of fact, he cannot try it, for the reaſon above given, but it muſt go to the King's Bench †.

Another branch of the judicial buſineſs is the hearing of the petitions to the king for juſtice in his own cauſes. No man, by the feudal principles of our law, can bring an action againſt the king. For the charging him with wrong doing would be a breach of fealty. The king cannot, by our law, do wrong; but yet, from the multiplicity of his occupations, or from his being miſinformed, the ſubject may ſometimes ſuffer wrong from him. The remedy thereof, in this caſe, is by humble petition to the king, that he would enquire into the cauſe, and do juſtice to the party, which, though conceived in an humbler ſtrain, is as effectual as an action, and muſt be tried in this court, the proper channel to convey his majeſty's graces, and the king, by his chancellor, diſpenſes juſtice to the party.

Another branch of the judicial buſineſs of this court was the proceeding in certain caſes againſt perſons privildged, that is, the officers of the court, who being ſuppoſed to be conſtantly attendant, were to be ſued here, as the officers of other courts were in their reſpective courts.

Laſtly, this court had juriſdiction with reſpect to proceeding upon *recognizances*, or acknowledgements of obligations taken in this court, which being here recorded, and not to be removed, were properly here triable ‡.

† 4. Inſt. p. 155. 79. 206.

‡ 4. Inſt. ch. 8. Bacon, hiſt. and polit. diſcourſe, part. 2. ch. 18.

There are ſome other cauſes, proper for the juriſdiction of Chancery, which would carry me too far at preſent. I ſhall, therefore, conclude here with mentioning one ſtriking difference between this and the other courts, that they ſit only in the times of the four terms, whereas it is open all the year. The confining the others to the terms aroſe from the religion of the times, and the inquiſitions of canon law, which forbad courts to be held during the ſeaſons of the three great feſtivals, and of harveſt. In obedience to this law, I may ſay (for the papal power was then very high in England) was our Michaelmas vacation ſet apart for the ſolemnization of Chriſtmas, the Hillary vacation for Eaſter, the Eaſter vacation for Whitſuntide, and the Trinity or long vacation, for the uſes of huſbandry. But great would be the evils, if that court which is the *Officina Juſtitiæ*, the ſhop of Juſtice, were to be ever ſhut. Writs, therefore, iſſued hence at all times, and all ſuch cauſes as, for the public good, cannot brook delay till the ordinary times of ſitting of other courts, are here handled in the vacations, ſuch as to mention a few, *habeas corpus's* and *homine replegiando's* to reſtore perſons impriſoned to liberty, prohibitions to keep inferior courts within their proper limits; and *replevins*, to reſtore the poſſeſſion of goods diſtrained.

But the great buſineſs of this court, as a court of common law, was, that it was the *Officina Brevium*, the ſhop where original writs were purchaſed by ſuitors, in order to commence their actions. An *original writ*, in the moſt common form, is an order to the ſheriff to ſummon the party complained of to do juſtice to, or elſe to anſwer to the complainant in the proper court; containing a ſhort deſcription of the complainant's title, and the wrong done to him

him, from whence, in Latin, it is called *Breve*, and anſwers to the original citation in the Roman and eccleſiaſtical laws. This, and the making out patents, was the principal buſineſs of the chancellor in the *curia regis*, and therefore naturally continued with him after the diviſion of the courts. The reaſons aſſigned by Gilbert for having one of theſe ſuperior courts a public ſhop for juſtice, are three; firſt, that it might appear that all power of judicature flowed from the crown; ſecondly, that the crown might not be defrauded of the fines due to it for ſuffering perſons to deſert the inferior courts, and to ſue for juſtice immediately from the king; and laſtly, to preſerve an uniformity in the law; for theſe writs being made out in one conſtant form contributed greatly thereto, being both a direction to the judge, and a limitation of his authority.

Originally, the chancellor heard the complaints of the perſon injured, and formed a writ according to the nature of the caſe, but as, among a rude military people, little verſed in commerce, and the variety of tranſactions that attend it, the complaints of the people were confined in a narrow compaſs, it but ſeldom happened, after ſome time, that there was occaſion for making a new writ, in a form different from what had been uſed before. Theſe forms, therefore, were collected into a book of our law, called the *Regiſter*, the antienteſt book of our law; and the making them out, being now matter of courſe, nothing more than copying out the old terms, inſerting the proper names of perſons, and places, and the chancellor's buſineſs encreaſing, became devolved upon the chancellor's clerks, the *Clerici*, as they were antiently, or the *Maſters*, as they are now called, of Chancery; and they were reſtrained from making out any of a different form from thoſe in the Regiſter.

Regiſter. However, as, in proceſs of time, caſes would happen which none of the forms in that book would ſuit, and it was looked on as the corner-ſtone of the law, the chancellor could not of himſelf venture to make out new and unuſual writs, but referred the complainants, in ſuch caſes, to petition the parliament for remedy †.

Theſe petitions afterwards growing too frequent, and interrupting the public buſineſs, it was found neceſſary to enlarge the power of the Maſters of Chancery, and to give them a qualified power of forming new writs. This was done by the ſtatute of Weſtminſter the ſecond, cap. 24, in Edward the Firſt's reign; it runs thus: *Quotieſcunque de cætero evenerit me cancellaria, quod in uno caſu reperitur breve, & in conſimili caſu cadente ſub eodem jure, & ſimili indigente remedio, non reperitur, concordant clerici de cancellaria in breve faciendo, vel atterminent querentes in proximum parliamentum, & ſcribantur caſus, in quibus concordare non poſſunt & referant eos ad proximum parliamentum, & de conſenſu juriſperitorum fiat breve ne contingat de cætero, quod curia domini regis deficiat conquerentibus in juſtitia perquirenda;* which laſt words, *ne contingat*, &c. gave a handle, as I ſhall ſhew hereafter, to this court to erect their equitable juriſdiction ‡.

We ſee how this power given to the Maſters was limited: it muſt be exerciſed only in caſes parallel to ſuch as there was a remedy already provided for; all the Maſters muſt agree in the form of the new writ; and the remedy muſt be the ſame as was in the ſimilar caſe in the Regiſter. To illuſtrate this by the example of the firſt writ formed by

† Baron Gilbert's hiſtory of the Court of Common Pleas. Madox. hiſt. Exchеq. ch. 2. ſect. 9. 2 Inſtitute, p. 53. 407. 4 Inſtitute, ch. 8.

‡ 2 Inſtitute, p. 405.

by the Maſters upon this ſtatute, and which therefore, by way of eminence, is called a *writ, in conſimili caſu.* The ſtatute of Gloceſter ordered the Chancery to form a writ for the relief of the perſon in reverſion, where a tenant in dower had aliened her dower. The writ was accordingly framed, and inſerted in the Regiſter. Now, by virtue of this ſtatute of Weſtminſter, the Maſters framed the writ *in caſu conſimili,* in favour of the perſon in reverſion, where a tenant by the courteſy, or tenant for life, had aliened, he being equally damaged as the former caſe. But though this was particularly called *a writ, in caſu conſimili,* there were many others formed by virtue of this ſtatute, ſuch as for various kinds of treſpaſſes unknown in former ages, and actions upon the caſe, ſo frequent in theſe our days, and ſo called, becauſe the writ is formed according to the circumſtances of the caſe, and not upon the old forms continued in the Regiſter.

This new employment of Maſters in Chancery, and the buſineſs of the court encreaſing, created a neceſſity of erecting new officers, to make out the *brevia de curſu,* namely, thoſe in the Regiſter, who were therefore called *Curritors.* The chief of the Maſters is *Keeper of the Rolls* of this court, which was formerly a part of the chancellor's buſineſs; and he is therefore called *Maſter of the Rolls.* For ages paſt, ſince the Equity buſineſs multiplied in England, this officer has been there, in matters of equity, an aſſiſtant judge to the chancellor, but his decrees are liable to a rehearing, and to be reverſed by the chancellor. But in this kingdom, the office hath not had any judicial authority annexed to it.

LEC-

LECTURE XXXIV.

The court of Common Bench or Common Pleas—The juriſdiction of this court—Actions real, perſonal, or mixt—The court of Exchequer—The juriſdiction of this court—Exchequer chamber—The judicature of Parliament.

THE next of the ſuperior courts, is the *Common Bench*, or *Common Pleas*, as it is more commonly called, being the proper court for the determining ſuits between ſubjects, wherein the king is not concerned; and upon the multiplication of buſineſs in the *curia regis*, it was ſeparated from it, for the more ſpeedy and eaſy diſpatching the affairs of the people. As in the very old times the king often ſat in perſon in the *curia regis*, and that he might have an opportunity of ſo doing when he pleaſed, that court always followed the king wherever he went within the kingdom of England; and in thoſe days it was cuſtomary for the kings to take progreſſes; and reſide in the different ſeaſons of the year in different parts of the kingdom, as we ſee, by the variety of places where the parliaments were held in old times. The ſame practice of the courts and the records following the perſon of the king continued in France longer than in England. For when king John was taken by the black prince at the battle of Poictiers, the antient records of that kingdom were loſt, and there are ſcarce any now remaining there, of what had paſſed previous to that time,

time, except enrolments made ſince, of the antient charters that were in the hands of the ſubjects.

But in England the conſtant removal of the courts was found very burdenſome to the people, who had ſuits much earlier. For their eaſe, therefore, it was enacted in *Magna Charta*, that *communia placita non ſequantur curſum noſtrum, ſed teneantur in aliquo certo loco;* that the Court of Common Pleas ſhould no longer be ambulatory, but held in one certain place. Weſtminſter was the place fixed upon, and there, if we except ſome occaſional removals, on account of epidemical ſickneſſes, hath it been held ever ſince. And in long ſpace of time after, the other courts became, though not in purſuance of any poſitive law, fixed there alſo. By their becoming ſettled in a certain place, one great inconvenience, beſides the hardſhips on the ſuitors, was avoided, namely, the loſs and imbezzlement of the records by theſe frequent removals. For it is very remarkable, that there is not a record remaining of the times previous to the fixing of the courts, not even the enrolments of the acts of parliament themſelves, except a few, and a very few, of the courts of Exchequer, which, concerning the king's revenue, were more carefully preſerved †.

But the greateſt advantage that attended this change was the improvement of the law, and, what was a conſequence thereof, the preſervation of the liberty of the ſubject.—For now it became much more convenient for perſons to apply to that ſtudy, when they were no longer under a neceſſity of removing. And we therefore, ſoon after, find the practitioners of the law ſettled together, ſomething in a collegiate manner; and after the diſſolution of the order of Knights

† 2. Inſtitute, p. 21, 22.

Knights Templars, the habitation of theſe latter, called the *Temple*, was granted to them for their reſidence and improvement. Here, they continued to confer the degrees of *Apprentices*, or *Barriſters at law*, and *Serjeants at law*, which they had began before, in imitation of the bachelors and doctors degrees in univerſities.

The preſervation of the liberty of the ſubject was, as I ſaid before, another happy conſequence that reſulted from the fixing the courts, and the uniting the profeſſors of the law into one body. For as, about this time the ſtudy of the civil and canon laws was eagerly purſued by the clergy in the univerſities, and the Engliſh cuſtoms as much depreciated by them as poſſible, and as thoſe two laws were founded on maxims of deſpotiſm, and, as ſuch, encouraged and ſupported to the utmoſt by the popes, and all kings that aimed at arbitrary power, the common lawyers were neceſſitated, for the ſupport of their profeſſion, to take the popular ſide of the queſtion, and to ſtickle for the old Saxon freedom, and limited form of government.

Hence the ſteady oppoſition they made, even in thoſe early times, to the king's diſpenſing. Nay, they carried their zeal for liberty ſo far, as (ſince they could not directly, in thoſe days, oppoſe the weight of the civil law) to quote the very paſſages of it that were in favour of abſolute power, and by their gloſſes make it ſpeak the language of liberty. Thus Bracton quotes the text: *Quod principi placet, legis habet vigorem*; that is, in its true meaning, the monarch is ſole legiſlator: but Bracton's comment is, *id eſt, non quicquid de voluntate regis temere preſumptum fuerit, ſed quod concilio magiſtratuum ſuorum, rege auctoritatem præſtante, habita ſuper hoc deliberatione & tractatu, recte fuerit definitum*; that is, the king is not ſole legiſlator; directly contrary

trary to the ſenſe of the very text he quotes. And it muſt be allowed, to the honour of the common lawyers, that, with the exception of a few venal time-ſerving individuals, they have, for a ſucceſſion of ages, proved themſelves true true friends to a rational civil liberty in the ſubject, and to reaſonable power and prerogative in the king †.

To come to the juriſdiction of this court. Its proper buſineſs, as appears from its name, is to take cognizance of all *common pleas*, that is, all pleas that are not pleas of the crown, or at the ſuit of the king. With theſe it cannot meddle; for all actions at the ſuit of the king for criminal matters, belong to the King's Bench, as thoſe for his revenue do properly to the Exchequer. But it hath juriſdiction, and that univerſally, throughout England, in all civil cauſes, whether *real*, *perſonal*, or *mixt*; the diſtinction of which it will not be amiſs juſt to point out.

Real *actions* are thoſe that are brought to recover land itſelf, where the claimant has a right to an eſtate in it for life at leaſt; and theſe, until within theſe two hundred and fifty years, were the only ones uſed for that purpoſe; but, ſince that time, they are gone almoſt entirely out of uſe, on account of their nicety, their delays, their being concluſive; and their place is ſupplied by mixed actions, which are eaſier, ſhorter, and may be tried again. However, if any one was inclined, at this day, to bring ſuch an action, this is the court to bring it in; and therefore all *common recoveries*, which antiently were, and ſtill carry the form of, real actions, were ſuffered in this court.

Perſonal *actions* are thoſe that are brought for the recovery either of ſome duty, or demand in particular, or of damages

† Bracton, lib. 1. cap. 1. Forteſcue de laud. leg. Angliæ, cap. 34.

mages for the non-performance of ſome promiſe or contract, entered into, or laſtly ſuch as are brought by a man to recover a compenſation in damages for ſome injury ſuſtained in his perſon—or property. To give but one or two inſtances of theſe laſt: If my ground is treſpaſſed on, if my perſon is aſſaulted, my reputation injured, the remedy is by the perſonal actions of *treſpaſs*, *aſſault & battery*, or *ſlander*. All actions for breach of covenants are likewiſe perſonal actions; for, by the common law, damages only are recoverable thereon, and the party is not obliged to perform the covenant. Wherefore, if a man chuſes rather to have his covenant performed than receive a ſatisfaction in damages, he muſt go into a Court of Equity, which will oblige a man to perform in ſpecie, what he hath ſpecifically engaged to perform, if the performance is poſſible. This court, therefore, being the proper court for perſonal actions, fines of lands are levied here; for they are fictitious actions, founded on a fictitious breach of covenant.

Mixed actions are deſigned for the recovery of a ſpecific thing, and alſo damages, and conſequently partake of the nature both of real and perſonal actions. For inſtance: If a tenant for life, or years, or at will, commits waſte, he forfeits to the owner of the inheritance the place wherein the waſte was done, and treble damages. The *action of waſte*, therefore, being brought to recover both, is a mixed action. The action of *ejectment* alſo, which was originally proper to recover damages for being put out of a leaſe for years, but is now the common remedy, ſubſtituted in the lieu of real actions, is now of the ſame nature; becauſe both the land itſelf, and damages for the wrong are recovered *.

Theſe

† Baron Gilbert, Hiſt. of the court of Com. Pleas. 4. Inſt. ch. 10.

These three kinds of actions are properly the business of this court, though, as to the two last, actions personal and mixed, the courts of King's Bench and Exchequer have, by fictions, gained a concurrent jurisdiction with this court; the King's Bench, by supposing the defendant to be in the custody of the marshal thereof; and the Exchequer, by supposing the plaintiff to be a debtor to the king.

The proper way of founding the jurisdiction of this writ, is by a writ out of Chancery, returnable hither, either to begin a cause originally here, or to remove one depending in an inferior court not of record; but, in some cases, they proceed without any writ from Chancery, as in causes brought by or against an officer of the court, and likewise, in granting prohibitions to other courts that attempt to enlarge their jurisdictions.

Before I conclude, I must observe, that this court, though one of the four high courts derived out of the *curia regis*, is not, however, supreme, but subordinate to the King's Bench. For judgments given therein are reversible in the King's Bench, by a writ of error issuing from the Chancery, suggesting the king's being informed that manifest error has intervened, and commanding the record to be transmitted into the King's Bench; the judges belonging to which, upon the face of it, and nothing else, are to affirm or reverse the judgment; for the error must be manifest; and no error in point of fact, but error only in point of law, can be averred against a record.

The lowest in rank of the four great courts, though from antient times one of the greatest importance, is the court of *Exchequer*, whose business was to collect in the several debts,

debts, fines, amerciaments, or other duties or properties belonging or accruing to the king, and likewiſe, to iſſue money by his orders; and this court being originally ſolely erected for the king's profit, is the reaſon, I preſume, why it is held in rank the loweſt; it being more honourable to the crown to give precedence of rank to thoſe courts that were intended for the adminiſtration of juſtice to the ſubject, above that which was intended merely for the king's temporal advantage. Beſides, this court was, in its original, diſtinct from the *curia regis*, the treaſurer being the judge in this, as the *juſticiarius Angliæ* was in the other; and therefore, it was regular, that the Chancery, and Common Pleas, as having been once part of the ſupreme court, ſhould take place before this. Its having been originally a diſtinct court, accounts for its independency on the King's Bench; for, no writ of error lies from it to the King's Bench, as doth from the Common Pleas, but its errors are rectified in another manner*.

This court, as well as the Chancery, hath, properly ſpeaking, two courts: one, ordinary, proceeding according to the ſtrict rules of the common law; the other, by equity; for, as it is the king's duty to render juſtice with mercy, ſo, in this court, the rights of the king are not always exacted with rigour; but, on circumſtances of reaſon and equity, may be mitigated or diſcharged. The court of common law in this court had antiently much more buſineſs than of late. Originally, whilſt the royal demenſnes were unalienated, they had the ſetting of them for years; but, afterwards, people chuſing rather the authority of the great ſeal, took them in Chancery. That court, as I mentioned when treating of it, had likewiſe gained the returns

* 2d. Inſt. p. 196. 197. 255. 551.

turns of inquiſitions of office, and had alſo gained by act of parliament, the compoſition of forfeitures, for the king's tenants *in capite* aliening their lands without licenſe; which, otherwiſe, would have belonged to this court. The ~~elec~~ erec tion of the *Court of Words*, alſo, by Henry the Eighth, took off that branch of its juriſdiction; and the aboliſhing of the military tenures by Charles the Second took away the buſineſs of calling in their fruits. The erecting the office of *the Treaſury*, as diſtinct, for the iſſuing of money, had the ſame effect; but, above all, the erecting new juriſdictions, and appointing new judges to try cauſes relative to the new taxes, as the Commiſſioners of the Cuſtoms and Exciſe, and Commiſſioners of Appeal, diminiſhed the peculiar buſineſs of the court †.

It will be now proper to conſider the nature and extent of their preſent juriſdiction. Here then are ſworn the ſheriffs, and other officers concerned in the king's revenue and duties; and here they are to return, and make up their accounts. Here, likewiſe, the king ſues his debtors, or even the debtor of his debtor (for ſo far his prerogative extends); and here alſo, for enabling his debtors to pay him, they are priviledged to ſue their debtors; an allowance that hath grown up by degrees to extend the juriſdiction of this court, and to make it concurrent with the Common Pleas. For it is only alledging, (and this they will not allow to be traverſed or denied) that the plaintiff is the king's debtor, and the buſineſs is done. The court acquires an immediate juriſdiction. The ſame allegation is likewiſe neceſſary, when a ſuit of equity is commenced in this court; for otherwiſe, the ſuit would, on the face of it, appear to belong to Chancery. I need ſcarce obſerve, that

† 4th Inſt. ch. xi.

that the officers of this court are to ſue and be ſued here; for that is a privilege common to the officers of all the courts, ariſing from their perſonal attendance. Here, likewiſe, the king's attorney-general exhibits informations for concealment of cuſtoms and ſeizures, informations upon penal ſtatutes, where there is a fine due to the king, forfeitures and breach of covenant to the king; likewiſe all informations for intruſions, waſtes, ſpoils or encroachments on the king's lands; in general, where the crown ſuffers in its profits.

In this court of common law, the *Barons of Exchequer* only are judges, and are called *Barons*, becauſe antiently none were judges there under that degree. In the Court of Equity, the chancellor of the Exchequer is joined with them, though it muſt be owned this officer hath ſeldom, of late years, acted either in England or Ireland, in his judicial capacity, and it hath been conſidered little more than as a great lucrative place. Errors in this court are not, as I obſerved before, redreſſed in the King's Bench, as thoſe of the Common Pleas are, but in another court, called the Exchequer Chamber, conſiſting of the lord chancellor, lord treaſurer, and chief judges.

There is another court of *Exchequer Chamber* in England, tho' we have none ſuch in this kingdom, erected 27th Eliz. and compoſed of the judges of the Common Pleas and barons of the Exchequer, in which lies a writ of error from the King's Bench, to reverſe judgments in certain ſuits commenced there originally. Into this court are frequently removed, or adjourned from any of the other courts, cauſes that are of a new impreſſion, and attended with difficulty, or even ſuch concerning which the judges, perhaps

haps, entertain no great doubts, but are new, and attended with extenſive conſequences; and this, for the more ſolemn determination, that all the judges of all the courts might be conſulted about eſtabliſhing a new precedent. Antiently ſuch cauſes were adjourned into parliament, but the legiſlative buſineſs of that high court increaſing, this court was ſubſtituted for the above purpoſe of conſultation †.

To finiſh this account concerning the ſuperior courts at once, it will be proper to ſay ſomething of the ſupreme judicature of all, that of parliament. Antiently, as I have frequently obſerved, all cauſes but ſuch as concerned the king or peers, or thoſe that were of great difficulty, or ſuch as juſtice could not be expected in by law, were diſpatched in the county courts, the reſt by petition to the king in parliament, or in the intervals thereof, in the *curia regis*, which originally was but a committee thereof, appointed by the king. Hence matters determined there, were ſubject to a review in parliament; writs of error from the King's Bench returned there; and when the Equity courts grew up, appeals from the Chancery and Exchequer in matters of equity. This power of judicature is peculiar to the lords (for the parliament conſiſted at firſt only of them, and when the commons were introduced, they ſat in a diſtinct houſe) and the parliament hears at preſent only matters that come from other courts by appeal, or by writ of error, which is in the nature of an appeal, and no cauſes originally. It is true, that, for a long time after the diviſion of the courts, many cauſes by petition were brought into parliament in the firſt inſtance; but theſe being generally referred to the courts below, the practice ceaſed, and would not now be allowed.

† 4th Inſt. ch. 13.

For a long time accuſations againſt peers were originally admitted, but at preſent, and for this long time, indictments found below are required before a peer can be tried; nor can the trial of peers by impeachment in parliament be conſidered as an original trial, for the commons are conſidered as the grand inqueſt or grand jury of the whole nation, and therefore an impeachment by them is not only equivalent to, but has and ought to have greater weight than any indictment by any private grand jury.

In this judicature of the lords, an impeachment there, is one ſingularity, an exception to the grand rule, that every man is to be tried by his peers, and that is, that a commoner impeached by the commons ſhall be tried by the lords. The reaſon of this procedure ſeems to be, that all the commons of England are ſuppoſed parties to the accuſation, when their repreſentatives have accuſed him, and it might be dangerous to trnſt his life with a common jury; but the lords are ſtrangers to the charge, and it is their intereſt to controul the commons, if they proceed with too great violence †.

† Hales of the power and juriſdiction of parliament. Selden of the Judicature of Parliament. See his works vol. 3. 4. Inſt. ch. 1.

LECTURE XXXV.

Henry II.*'s diſpute with Becket—The conſtitutions of Clarendon—The murder of Becket.*

HAVING, in a general manner, run through the juriſdictions of the ſeveral great courts of the kingdom, which were divided from each other about the time I am now treating of, though the diviſion was not compleated, nor the ſeveral limits exactly adjuſted till ſome time after; I ſhall proceed, in a ſummary way, with the few remaining obſervations I have to make, with reſpect to the ſtate of the law during the reign of Henry the Second. And the greateſt and moſt remarkable of theſe was his diſpute with Becket, archbiſhop of Canterbury; a conteſt attended with the moſt fatal effects, and which makes up a conſiderable part of the civil hiſtory of that reign. The particular circumſtances that attended it, and the many turns it took, I ſhall not dwell on; but, as it aroſe from the claſhing of contrary laws, I ſhall briefly lay open its ſource, and give an account of the events.

From the year of Chriſt one thouſand, the popes had every day been encreaſing their power, and extending their pretenſions. They ſet themſelves up, at firſt, as protectors of the clergy, who really had been oppreſſed by the temporal princes, and in order to attach them more firmly to their intereſts, they made canons in councils, and publiſhed decretal epiſtles, by their own ſole authority; which,

in thoſe days of ſuperſtition, were too readily received as laws; all tending to depreſs the civil power, to raiſe the eccleſiaſtical on its ruins, and, in ſhort, to pave the way for making the pope ſupreme monarch of the world, in matters temporal as well as ſpiritual. The emperors, however, ſtickled hard, on the other hand, to ſupport their rights, and particularly to maintain to themſelves the nomination of the popes, as well as of other biſhops, which the popes had transferred to the people of Rome firſt, and afterwards to the clergy alone; ſo that, for a good part of this time, there was a ſchiſm in the church, and two popes in being, the one named by the emperor, and the other elected; and I obſerved before, William Rufus kept himſelf independent by acknowledging neither, and was abſolute maſter of the church. However, the popes that were elected, generally gained ground. They had the majority of the clergy on their ſide, and indeed moſt of the ſovereign princes of Europe, who were jealous leſt the emperor, under pretence of being ſucceſſor to the Romans, might arrogate a ſuperiority over them.

It is ſurpriſing, yet very true, that, in theſe conteſted times, the papal power was puſhed very near its greateſt height. The materials, indeed, were formed and collected ſome time before. A multitude of fictitious decretal epiſtles had been forged in the names of the antient popes, ſo early as from the year 800, all tending to exalt the biſhop of Rome, as head over the church univerſal; but theſe were not as yet generally known and received as laws, the church being hitherto governed by collections of canons made by private perſons, out of the canons of the general or provincial councils and ſayings of the fathers. But in the reign of our Stephen, the mighty fabrick began to be reared, and

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to take a regular form. Gratian, a Roman courtier, undertook to make a new compilation of eccleſiaſtical laws, and publiſhed it under the name of *Decretum*, which is now the firſt volume of the canon law. This is a motley compoſition, digeſted under diſtinct heads or titles, of rules and deciſions, collected from the ſayings of the fathers, canons of the councils, and, above all, from the decretal epiſtles of the popes, (the modern ones real, the ancient ones forged), and was put together principally for the two great purpoſes, of aggrandiſing the See of Rome, and exempting the clergy from lay-juriſdiction. And, for that purpoſe, not only forged epiſtles and canons have been inſerted in it, but the real canons and writings of the fathers have been, in many places, falſified by adding or omitting words as beſt ſerved the purpoſe propoſed; and that this is the caſe of Gratian's work, the learned Papiſts themſelves confeſs, in many inſtances. However, in that ignorant age, it paſſed eaſily all for genuine. But the popes, wiſely conſidering, that, if it was canvaſſed, it would not bear a ſtrict ſcrutiny, never choſe to give it an authentic teſtimony of their authority, but contented themſelves with authoriſing it to be read in univerſities. In the interval I have mentioned, the popes began to turn their ſpiritual arms of excommunication or interdict, that is, forbidding the adminiſtration of divine offices, except in *articulo mortis*, in a country or diſtrict, to temporal purpoſes, and the ſupport of their grandeur†.

On this ſtate of affairs happened the quarrel between the archbiſhop and Henry, which embroiled him with the pope, embittered his life, and was attended with conſequences that brought him to the grave with ſorrow. At this

† Giannone's hiſt. of Naples, b. 1. Bower's hiſt. of the Popes, vol. 1.

this time there were two popes, Victor, confirmed by the emperor, and Alexander, the moſt enterpriſing pope the world had yet ſeen, ſupported by the king of France. Had Henry followed the example of William, and acknowledged neither, he might have kept both in awe, and vindicated the rights of his crown with ſucceſs. But he was prevailed upon by Lewis of France to recognize Alexander, who was afterwards made an inſtrument of humbling Henry, of whoſe power that monarch was jealous. For his extreme partiality and ſeverity is, in part, to be aſcribed to the influence of his protector, as well as to his zeal for eccleſiaſtical immunities. Theſe immunities had grown to an exceſſive height, and, under the pretence that no man ſhould be twice puniſhed for one offence, the biſhops took care to inflict penance on eccleſiaſtical offenders, and then refuſed to ſuffer them to be tried by the laws of the land; ſo that the moſt profligate ruffians crowded into the lower order, and committed with impunity (except penance, or rather, a pecuniary commutation for it) what murders, rapes, and robberies, they thought fit. Henry was ſenſible of thoſe enormities, and, in hopes of curing them by the aſſiſtance of one highly obliged to him, got Becket, who was lord chancellor, his favourite, and indebted to him for his grandeur, promoted to the See of Canterbury. But he ſoon found how much he was miſtaken in his man. Becket had been bred in his youth in the ſtudy of the eccleſiaſtical laws, and, though he had in all things hitherto complied with the king for his advancement, was, at the bottom, ſtrictly attached to his order and its privileges, and reſolved, at whatever price, rather to extend than diminiſh them.

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To dazzle the people, he threw aſide the pomp and expenſive life of a courtier, and aſſumed the character of mortification and ſanctity. He began by reclaiming the eſtates belonging formerly to his ſee, though they had been aliened by his predeceſſors, with the conſent of their chapters, and upon valuable conſideration; and this under pretence of a canon, made a year or two before by Pope Alexander, in a packed council at Troyes in France; which was plainly ſaying, that an eccleſiaſtical canon might repeal the laws of any country, and ſubvert its conſtitution. He made an attempt likewiſe on the patronages of laymen, and appointed a parſon to a church, which belonged to one of his own tenants, and afterwards excommunicated the tenant for turning this perſon out, although he was the king's tenant *in capite*; and ſuch, by a law of the conqueror, were forbid to be excommunicated without the king's leave, under the penalties of treaſon. This was a very neceſſary law; as otherwiſe a biſhop might, by his ſentence, deprive the king of his ſervice, and that of as many of his military tenants as he pleaſed. However, in this point, when he found he was in danger of being proſecuted on the law, he relented, and abſolved the gentleman †.

His ſcreening of criminals was exerciſed alſo in the moſt ſhameful manner. A lewd clerk had debauched a young lady, and afterwards publickly murdered her father, and this criminal was refuſed to be given up to be tried. Another was guilty of ſacrilege, in ſtealing a ſilver chalice out of a church, and *Becket* would not ſuffer him to be tried by the laws of the land. However, as the offence concerned the church, and was therefore of a very heinous nature, he tried

† Lord Lyttleton's hiſt. of Henry II. b. 3.

tried him himſelf; and having found him guilty, branded him with a hot iron, in defiance both of the Engliſh and canon laws, neither of which allow ſuch puniſhments to an eccleſiaſtical judge. But he knew he was too faithful a ſervant to the Pope, to be called to an account even for making free with his own law.

Henry, finding it neceſſary to ſtop the prelate's career, ſummoned an aſſembly of the biſhops, and demanded of them that they ſhould degrade all eccleſiaſtical murderers, and deliver them over to the ſecular arm. At firſt the majority ſeemed to think this a reaſonable propoſal, as they muſt, in the firſt place, find them guilty before they were to be given up. But *Becket* brought them over, by repreſenting, that, by the canon law, they were not to be concerned in matters of blood, and that their delivering over any criminal to capital puniſhment would be infringing thereof. They therefore refuſed the king. He then demanded whether they would obſerve the laws and cuſtoms of the kingdom. Their anſwer was, in all things that did not interfere with the rights of their order. The king left the aſſembly in wrath, and at length, Becket was, by the intreaties of the other biſhops, and even of the Pope's legate, who knew his maſter, being embroiled with the antipope, was not able, at this time, to ſupport him, prevailed with to wait on the king, and promiſe to obſerve the laws of the land without any reſervation †.

Henry, ſenſible that ſuch a general promiſe, when particular facts aroſe, might be explained and evaded, was reſolved that the limits of the eccleſiaſtical juriſdiction ſhould be aſcertained in ſuch a manner as would leave no room for ſubterfuges;

† Daniel, ap. Kennet. Carte.

ſubterfuges; and to that end called a parliament at Clarendon, wherein Becket and the biſhops ſwore to obſerve the laws there made, called *conſtitutions*, as new laws, but declared to be the old laws of the realm. Theſe conſtitutions were in number ſixteen. I ſhall mention a few of the principal, in order to give a notion of the points of juriſdiction then conteſted between the ſpiritual and lay courts. Firſt, then, it was declared, that ſuits about preſentations to livings belong to the king's courts; that clergymen ſhould be tried for temporal crimes in the temporal courts: and that, if they pleaded guilty, or were convicted, they ſhould loſe the eccleſiaſtical privilege; that no clergyman ſhould quit the realm without the king's licence, nor attain it, without giving ſecurity to attempt nothing to the prejudice of the king or kingdom; that no immediate tenant, or officer of the crown, ſhould be excommunicated without the king's licence; that appeals in eccleſiaſtical cauſes ſhould be made from the arch-deacon to the biſhop, from the biſhop to the archbiſhop, from the archbiſhop to the king.

This indeed was ſtriking at the root of the Pope's ſupremacy, and of his profits too. It was in truth declaring the king ſupreme head of the church as to juriſdiction; next, that all that held eccleſiaſtical dignities by the tenure of baronies, ſhould do the duty of barons, and among the reſt ſit in judgment as barons; however with this favourable allowance to them, in conſideration of their being bound by the canon law, that they might retire when the queſtion was to be put about loſs of life or limb; likewiſe that no biſhop, or abbot, ſhould be elected without the king's conſent; nor, when elected, be conſecrated till they had firſt done homage and fealty; that the ſpiritual courts ſhould not hold plea of debts due upon oath; and laſtly, that the

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ſpiritual and temporal courts ſhould mutually aid each other in carrying their ſentences into execution †.

Such were the moſt material of the famous conſtitutions of Clarendon drawn from the antient practice, and law of the kingdom, which the Pope afterwards declared null and void, as contrary to the rights of the holy church; which was plainly aſſuming the ſupreme legiſlature in every thing that had the moſt diſtant relation to a church, or a churchman. But Becket, who had ſworn to obey the old laws only, for fear of perſonal danger at that time, did not wait for the Pope's condemnation of them, but inſtantly ſhewed he was reſolved to diſobey, by enjoining himſelf penance, and abſtaining from officiating till he could obtain the Pope's abſolution. Henry, provoked to the uttermoſt, was now reſolved to cruſh him. He called him to an account in parliament for all the king's moneys that had paſſed through his hands while he was chancellor, and for one thouſand marks he had lent him; demands that the king had never intended to have made, but for his refractorineſs; and which he well knew he was not able to pay, having embezzled them in high living.

The archbiſhop reſolved to ſtand out to extremity: he offered a moſt wonderful plea in a cauſe merely civil, that of debt, *viz.* that his being made archbiſhop of Canterbury had diſcharged him of all former accounts and debts, and appealed, even in this purely civil cauſe, to the Pope. When reproached with contravening the conſtitutions of Clarendon, contrary to his oath, he broached another curious maxim, That, in every oath a clergyman could take, there

† Hoveden. edit. Savil. 494—549. Mat. Paris. an. 1164. Lord Lyttelton's hiſt. of Henry II. book 3. Brady's hiſtory.

there was a *tacit ſalvo* for the rights of his order; he forbid the biſhop to ſit in judgment upon him, under pain of excommunication. He would not hear his ſentence, but told the peers that he was their father, and they his children, and that children had no right to ſit in judgment on their father. He then departed, in contempt of the court, and went over to France, where he was kindly received by that king; and the Pope avowed and encouraged him in all the extravagances he had advanced, received his appeal, and annulled all ſentences againſt him.

However, as the ſchiſm was not yet ended, he kept him in for ſome time from proceeding to extremities; but as ſoon as the danger was over, the Pope ſuffered him to thunder out his excommunications againſt all the miniſters of the king, and all that obſerved the conſtitutions of Clarendon. The king himſelf, indeed, was ſpared, and the kingdom was not, on this occaſion, laid under an interdict; a circumſtance then much apprehended. The king, on the other hand, enacted, that no appeals ſhould be made to the archbiſhop, or Pope; that the lands belonging to Becket ſhould be confiſcated; that the clergy who reſided abroad ſhould return in three months, or forfeit their benefices; and that no letter of interdict ſhould be brought into England, the penalty of which laſt was afterwards made the ſame of treaſon.

The king was not a little uneaſy at the apprehenſions of perſonal excommunication, or of an interdict's iſſuing, as he obſerved the cenſures already paſſed had but too much influence on the weakneſs of many of his ſubjects. He therefore, to ward the blow, had recourſe to negotiation, which

which the Pope readily admitted, who feared, on the other hand, from the popularity of Henry's and the unpopularity of Becket's conduct, that his eccleſiaſtical thunders might be ſlighted in England. He contrived, however, in the interim, to embroil him with the king of France, and other powers on the continent. Matters continued on this footing for ſome years, in a train of negotiation; in the courſe of which the moderation of the king and the inſolence of the archbiſhop were equally remarkable, till, at length, the former, finding the Pope had trod down all oppoſition, and that his own intereſt was on the decline, was obliged, I may ſay, to ſubmit; for he was reconciled to Becket; engaged to reſtore his and his adherent's effects, and to ſuffer him to return to England, which he did with the additional quality of legate of the Pope; and no mention was made of either ſide, of the ſubject of the diſpute.

But Becket was reſolved to ſhew the world he had conquered. He began the exerciſe of his legatine power, by ſuſpending and degrading the clergy, and excommunicating the laity that adhered to the laws of the kingdom. Nay, he excommunicated two of the king's tenants for cutting off the tail of his ſumpter mule; ſo ſacred was the beaſt become.

Soon after he was murdered at the high altar, in conſequence of a raſh ſpeech of the king's, in a barbarous manner, as all, any way acquainted with the hiſtory of England, muſt know; and now was Henry compleatly at the Pope's mercy. For Becket, dead, ſerved the ſee of Rome more effectually than he ever could have done living. The bloodineſs of the fact, the ſacredneſs of the place where it was committed, and the reſolution with which he died, filled

filled not only all England, but all Europe, with religious horror. Miracles in abundance he immediately wrought, and he who by many was looked upon as a traitor, was now univerſally eſteemed a ſaint and a martyr; and ſo he was to the intereſt of the See of Rome.

In theſe circumſtances Henry was obliged to ſubmit to be judged by the Pope's legates, who, at length, abſolved him, on his ſwearing that he had not willingly occaſioned the murder, and that he felt great grief and vexation on account of it; in which, no doubt, he was ſincere. But before he could obtain it, he was obliged to promiſe to be faithful to Alexander and his ſucceſſors, not to interrupt the free courſe of appeals to Rome in eccleſiaſtical cauſes, and not to enforce the obſervance of evil cuſtoms introduced ſince his acceſſion to the throne; for ſo they ſtiled the conſtitutions of Clarendon, though they were only declarations of the old law. And thus ended this famous conteſt, in an abſolute victory on the ſide of the Pope †.

† Hume, Carte, Lyttleton, &c.

LECTURE XXXVI.

The rebellions of Henry's ſons—He is ſucceeded by Richard I.—*The ſteps taken at this period towards ſettling the ſucceſſion to the kingdom.—The laws of Oleron—Acceſſion of John—His cruelty and oppreſſions.*

HENRY's quarrel with the Pope, terminating in the manner it did, neceſſarily weakened the weight and influence he ever before ſupported, both in his own kingdom, and on the continent; nor could the unwearied pains he afterwards took, in redreſſing grievances, and making ſalutary laws, by the advice of his parliament, reſtore him to the conſequence he had loſt. The reſt of his life was ſpent in unfortunate wars with his rebellious children, inſtigated thereto by the artful Philip of France. And the pretence was grounded on a ſtep that Henry had taken in favour of his children, and I may add of his people, that of bringing the crown to a regular courſe of ſucceſſion, and by that means preventing conteſts upon a vacancy. Hugh Capet, the firſt of the preſent race of French kings, who came to the throne by election, in order to perpetuate it in his family, invented that practice which his ſucceſſors followed for near three hundred years, of aſſociating the eldeſt ſon, by cauſing him to be crowned in the father's life-time.

Henry, who loved his children, and was ſenſible that the not following this practice in England had occaſioned the wars between William and Henry the Conqueror's ſons, and

and their brother Robert, as well as thoſe between Stephen and himſelf and his mother, crowned his eldeſt ſon Henry. But the uſe which the ungrateful prince made of his advancement, was to embroil his father, by demanding the immediate ceſſion of Normandy, on pretence that, being a king, he ſhould have ſome country given up immediately to govern. Upon young Henry's death, the father, who knew Richard, with greater capacity, was equally unnatural with his elder brother, reſolved not to give him the ſame pretence to trouble him, and refuſed obſtinately to have him crowned; but this refuſal ſerved itſelf for a pretext for rebellion, as it gave Richard room to think, or at leaſt to pretend to think, that his father intended to diſinherit him, and to ſettle the crown on his youngeſt and favourite ſon John. In this rebellion Richard, aſſiſted by the king of France, and many of Henry's ſubjects, who probably ſuſpected Henry's deſign was ſuch as was ſuggeſted, prevailed, and the father was obliged to engage that his ſubjects ſhould take the oath of eventual allegiance to Richard, and ſoon after died of a broken heart, occaſioned by the undutiful conduct of every one of his ſons.

Richard accordingly ſucceeded; during whoſe reign we have little to obſerve concerning the laws, the whole time of it being ſpent in a continual ſtate of war either in Paleſtine or France. Enormouſly heavy indeed were the taxations his ſubjects laboured under, and yet they bore them with chearfulneſs. For the holy war, and the recovery of the ſepulchre of Chriſt from the infidels, no aids could be thought exorbitant; and for his wars after his return he was readily ſupplied out of affection; for the remorſe he ſhewed for having occaſioned his father's death, his admirable valour, the injuſtice of and the cruel treatment he received in his captivity, and, above all, the oppoſition between

between the perfidious conduct of the French king and his openneſs and ſincerity, endeared him to his ſubjects, made them ſhut their eyes on his many failings, and bear their burthens with patience.

Two things only paſſed in this reign proper for the ſubject of theſe lectures, the ſteps made for ſettling the ſucceſſion of the crown, and the laws of Oleron. As Richard was unmarried when he ſet out for Paleſtine, he thought it proper to prevent, if he could, any doubt that might ariſe, in caſe he died without iſſue. There might, in this caſe, be two competitors, Arthur, the ſon of Geoffry, his next brother who was dead, and John the youngeſt brother, who was living. However clear the point is at this day in favour of the nephew, it was then far otherwiſe. For Arthur might be urged the right of repreſentation. He repreſented his father Geoffry; in all the fiefs in France, the law was in favour of the nephew; nay, Glanville, who wrote in Henry the Second's reign in England, as to Engliſh eſtates, declared to the ſame purpoſe; and certain it is that the general current of opinions at that time tended that way †.

On the other ſide, it might be ſaid in favour of John's pretenſions, that the examples of fiefs could be no precedents in caſe of crowns. Theſe required more ſtrictly, a perſon capable of acting in perſon. That this was the very caſe; John was a man, Arthur a child; that, allowing Glanville to have laid down the law right, he had made a diſtinction, which comes up to this caſe; for he ſays, the uncle ſhall ſucceed, if the father of the nephew had in his life-time been *foriſfamiliated*; that Geoffry had been out of the

† Hale, hiſt. com. law, chap. 7.

the *patria poteſtas* of Henry, by being ſovereign prince of Britany; that in the Saxon times two caſes, for the excluſion of infants, had happened, much ſtronger than the preſent; that when Edmund the firſt died in poſſeſſion of the throne, his brother Edred ſucceeded, not his ſons; and though Edmund Ironſide had been king, yet, after the Daniſh uſurpation ceaſed, his brother the *Confeſſor* was preferred to his ſon, though of full age, whereas Geoffry never had the crown; that, ſince the conqueſt, three ſeveral times had the lineal ſucceſſion been ſet aſide by parliament. So that there were not wanting plauſible arguments of each ſide of the queſtion, and it is with injuſtice that modern hiſtorians, conſidering only the maxims of their own times, when a regular ſucceſſion has been eſtabliſhed, charge John with a manifeſt uſurpation of the crown of England. But that he was a manifeſt uſurper of the territories in France muſt be allowed; for, by the laws of that country, they ſhould have gone to the nephew.

A queſtion of this weight and difficulty ſhould regularly have been decided in parliament, which always hitherto had determined in ſuch matters; but Richard had never thought of the buſineſs till he left England, and then it was too late to proceed in that method. He was obliged, therefore, to content himſelf with declaring, by his own authority, his nephew Arthur his ſucceſſor; and, to prevent John's traverſing his deſign, he exacted an oath from him not to ſet foot in England for three years; but from this obligation he afterwards releaſed him, at the requeſt of their mother. John uſed all his arts to careſs the nobility, and ſupplant his nephew Arthur, as he fondly hoped Richard would never return. And indeed, the conduct of William Longchamp, biſhop of Ely, Richard's viceroy, contributed greatly to his ſucceſs; for, as to oppreſſions and

outrages, he was not exceeded even by William Rufus himſelf. This gave John a pretext for intermeddling to preſerve the liberties of the people. He ſent word to that prelate, that if he did not refrain from his exorbitancies, he would viſit him at the head of an army; which for ſuch an occaſion he might eaſily raiſe.

A general aſſembly, or parliament, was called, to compoſe the differences; in which it was ſettled, that Longchamp ſhould continue in the adminiſtration, and hold the caſtles during the king's life, but that, if he died without iſſue, they ſhould be delivered to John as ſucceſſor; and this agreement was ratified by the oaths of all the nobility and prelates, ſo that, as Arthur had the deciſion of the king in his favour, John by this means attained that of the people. Senſible how much this ſtep muſt offend the king, and of the dangerous predicaments he muſt ſtand in ſhould he return, he ſpared no pains to aſcend the throne even in the life of his brother, in which he was cordially ſupported by the king of France. But all his efforts were baffled by the vigilance of the regency, who had been appointed on Longchamp's depoſition, and was more neceſſary from his continuing in his former extravagancies. John even gave out that Richard was dead, and ſeized ſeveral caſtles, which he put in a ſtate of defence. He was, however, ſoon reduced, upon the king's return, and all his treaſonable practices pardoned at the interceſſion of his mother. When Richard came to die, he changed his mind as to Arthur, and by will appointed John his ſucceſſor: an alteration, conſidering his former attachments to his nephew, who had never offended him, that could proceed from nothing but his unwillingneſs to leave his dominions involved in a civil war through the intrigues and intereſt of his brother.

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The laws of Oleron concerning naval affairs are the only ſpecimen of this prince's legiſlative capacity. They were made at the iſle of Oleron, off the coaſt of France, where his fleet rendezvouſed in their paſſage to the Holy Land, and were deſigned for the keeping of order, and the determination of controverſies abroad. With ſuch wiſdom were theſe laws framed, that they have been adopted by other nations as well as England. And, I think, to this time we may, with probability enough, refer the origin of the admiralty juriſdiction. In his reign, for the firſt and the laſt time, was raiſed the feudal aid, for the redemption of the king from captivity.

Notwithſtanding all the faults of this prince, his firmneſs againſt the papal power is to be commended. Two of his biſhops having a controverſy, there was an appeal to the pope, who ſent a legate to determine it; but Richard prevailed on the parties to refer it to his arbitration, and would not ſuffer the legate to enter England, till he had made an end of the buſineſs; and when he did come, the king ſuffered him not to exerciſe his legatine power in any but one ſingle point, and that by his expreſs permiſſion. Notwithſtanding all the ſteps taken in favour of John, in order to pave the way for his ſucceſſion, the notion of Arthur's hereditary right had taken ſuch ſtrong root in the minds of many, that, had he been in England, and of a ſufficient age to manage his affairs, he might have had a fair proſpect of ſucceſs †.

The lower people indeed were eaſily prevailed on by his agents to take the oath of fealty to John, while the prelates, and nobility in general, retired to their caſtles, as

† Mare Clauſ. 386. Kennet's hiſtorians. Hume. Carte.

deliberating what ſteps they ſhould take; but, at length, by magnificent grants, and more magnificent promiſes, they were prevailed on to come in, and he mounted the throne without oppoſition. But in the French provinces his uſurpation met with more reſiſtance. Arthur had many partizans, and his cauſe was eſpouſed by Philip of France, the lord paramount, not with an intention to ſtrip John of all; for that, with Britany, would have made Arthur too powerful; but with a deſign to divide the dominions more equally between them, and perhaps to clip off a part for himſelf, as he afterwards did Normandy, as being forfeited by a ſentence of the peers of France, by John's murder of Arthur. By the way, I ſhall obſerve, that this ſentence was notoriouſly unjuſt. By the laws of France, Arthur was the undoubted heir of Normandy, and on his death his ſiſter ought to have ſucceeded, nor ought the duchy to have been forfeited by the crime of a wrongful poſſeſſor. Or, taking it the other way, that Philip had a right to chooſe his vaſſal, and, conſequently, that the inveſtiture he gave to John was valid; then was he rightful duke of Normandy, and Arthur, as duke of Britany, was his vaſſal, and had juſtly forfeited his life, by rebelling and endeavouring to depoſe his liege lord. That John was guilty of this crime there was no room to doubt; and truly, from the whole of his conduct from that time, he ſeemed to have been infatuated by the terrors of his conſcience; for it was but little leſs than frenzy. He knew he was, by this cruel act, become the deteſtation of his ſubjects in general, and that his father, in the midſt of his power and popularity, had been humbled by the Pope; and yet, at the ſame time, he trampled on the liberties of the former, and oppreſſed them in the moſt outrageous manner, and while his ſubjects were thus diſaffected, he openly ſet the latter at defiance.

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To this reign, however, ſo inglorious, and ſo miſerable to the Engliſh of that age, do their ſucceſſors owe the aſcertaining their liberties. He was, if we except William Rufus, the firſt of the kings that openly profeſſed to rule by arbitrary power. I do not mean to deny that every one of his predeceſſors from the Conqueſt had, in ſome particular or other encroached on their people, but then there were either peculiar circumſtances of diſtreſs, that almoſt enforced and excuſed them, or one or two wrong ſteps, were atoned for by the greatneſs and goodneſs of their general conduct. It is very obſervable, that, as England is almoſt the only country in Europe that hath preſerved its liberties, ſo was it the firſt wherein the kings ſet up for abſolute power: and the preſervation of them, I apprehend, was in a great meaſure owing thereto, that this claim was ſtarted there when the feudal principles, and the ſpirit of independency, except only in feudal matters, were in their vigour, and conſequently raiſed ſuch a ſpirit of jealouſy and watchfulneſs, as, though it hath ſometimes ſlept, could never be extinguiſhed; whereas, in other countries, the progreſs of arbitrary power hath been more gradual. It hath made its advances when the feudal ſyſtem was in its wane, and when the minds of men, by the introduction of the civil and canon law, were prepared for it.

What encouraged the kings of England to attempt this ſooner than other monarchs, we may judge, was the greater diſparity in riches between them and their vaſſals, than was in other countries; ſo that nothing much leſs than a general confederacy could curb them; whereas, abroad, two or three potent vaſſals were an overmatch for the ſovereign. Beſides, having ſubjects on each ſide of the water, not knit together in any common intereſt, they might hope

hope to uſe the one to quell the other. But whatever was the cauſe, ſo was the fact; and John, even before the death of Arthur, having removed the dread of a competitor, ſhewed, by a moſt extraordinary ſtep, what kind of ſovereign he was like to prove. By the law of theſe days a vaſſal was to pay his relief to his ſuperior out of his own demeſnes, and the profits of his ſeignory, and had no right to demand aid for that purpoſe from his ſub-vaſſals; John having detached Philip from his nephew's intereſt, by ceding a part of his French territories, was to pay twenty thouſand marks for the relief of the reſt; and, to receive this ſum, he, by his own authority, laid three ſhillings on every hide of land in England; thus making England to pay that relief for his foreign dominions, which his foreign ſubjects themſelves were not obliged to pay.

The next inſtance was in favour of the Pope, under pretence of the holy war. Innocent had laid a tax upon the clergy, of the fortieth of their revenues, and ſent a collector to England to gather it, whom John, of his own authority, empowered to collect it from the laity. Theſe two impoſitions were ſubmitted to, in as much as there was no plan of oppoſition then formed; but they afterwards occaſioned great diſcontent among a people, who thought no taxes could be raiſed without their own conſent. Accordingly, the next time he ſummoned his military tenants to attend him into France, they aſſembled at Leiceſter, and agreed to refuſe attendance, unleſs he would reſtore their privileges; for though, by the law of the Conqueror, they were obliged to go, they looked upon this obligation as ſuſpended by his behaviour. However, they had not yet ſufficiently ſmarted, to unite them thoroughly, and this affair was made up by his accepting a ſcutage.

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To enumerate all the exorbitances he committed would be tedious, and unneceſſary, as the remedies preſcribed in *Magna Charta* ſufficiently point out the grievances. Let it ſuffice to ſay, in general, that he oppreſſed his military tenants by exacting extravagant reliefs, by diſparagement of heirs, by waſting his wards lands, by levying exorbitant ſcutages, by ſummoning them to war, and delaying them ſo long at the place of tranſportation that they were obliged to return home, having ſpent all their money; or, when they were tranſported keeping them inactive till they were obliged to return for the ſame reaſon, and then, without trial, ſeizing their lands as forfeited. The ſame oppreſſions he extended to others, ſeized lands and tenements at will and pleaſure, impriſoned whom he pleaſed, laid heavy talliages on the ſocage tenants and boroughs, without any regard to the privileges they had obtained from his predeceſſors; and having, by theſe means excited the deteſtation of his ſubjects, and forfeited his reputation by loſing Normandy by his indolence, he took it into his head that he was a match for the Pope, and engaged in a conteſt with his Holineſs, which ſubjected him and his kingdom to the Roman See, tho' eventually it contributed not a little to the recovery of his ſubjects liberties.† The manner in which this happened ſhall be the ſubject of the enſuing lecture.

† Brady, Daniel, Tyrrel, and the general hiſtories of England.

LECTURE XXXVII.

John's diſpute with the court of Rome—Cardinal Langton promoted to be Archbiſhop of Canterbury—Pope Innocent lays the kingdom under an interdict—John is excommunicated—His ſubmiſſion to Innocent—The diſcontents of the Barons—Magna Charta and Charta de Foreſta—An examination of the queſtion, Whether the rights and liberties, contained in theſe charters, are to be conſidered as the antient rights and liberties of the nation, or as the fruits of rebellion, and revocable by the ſucceſſors of John?

IF Alexander the Third ſhewed the grandeur of the pontifical power in humbling Henry the Second, the diſplaying it in its full glory was reſerved for Innocent the Third who now reigned, and who being promoted to the papacy at the age of thirty ſeven, had vigour of body and mind to carry every point he engaged in, and was reſolved to puſh his power to the utmoſt. Having taſted the ſweets of Engliſh gold, in the collection made under pretence of the holy war, he had a great deſire to renew the experiment; and that he might be able to proceed with the leſs oppoſition, was reſolved to have an archbiſhop of Canterbury at his devotion; and the See falling vacant, a controverted election furniſhed him with an opportunity.

The election belonged to the convent of Chriſt-church, though it was conteſted with them by the ſuffragan biſhops.

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The very night the archbiſhop died, a faction of the younger monks reſolving to have an archbiſhop of their own chuſing, aſſembled, and choſe Reginald ſub-prior of the convent, and ſent him off before morning for Rome, to obtain the Pope's confirmation, of which they did not entertain any doubt, as it would be plucking a feather from the king's prerogative, that of a previous licence for proceeding to election; and Innocent had already ſhewn that he looked on himſelf as monarch of monarchs. But as they could not expect the Pope would take this ſtride in ſupport of a clandeſtine election, they all took an oath of ſecrecy, to be obſerved till the confirmation was obtained.

But Reginald's vanity defeated the ſcheme, and made him divulge it, which ſo provoked his electors, that they joined with the others, petitioned the king for a licenſe, and elected, at his recommendation, the biſhop of Norwich, and twelve of the monks were diſpatched to ſolicit his confirmation. The ſuffragan biſhops oppoſed him, as being elected without their concurrence, which point was determined for the convent by Innocent; notwithſtanding which, without aſſigning any invalidity in the ſecond election, he annulled it as well as the firſt, and recommended to the twelve deputies to elect Stephen Langton, an Engliſhman and a cardinal. At firſt they demurred, as having no authority; but the threat of inſtant excommunication compelled them to obey. And then, as if they had done nothing out of the way, he recommended Langton to John in a very civil letter. The king, enraged to the higheſt, turned the monks of Canterbury, who were entirely innocent, out of their convent and the kingdom, and threatened the Pope that he would ſuffer no appeals. Innocent, who had before this humbled Philip of France by an interdict, and knew the man he had to deal with, proceeded very calmly, to order three biſhops to exhort the king to receive Langton,

ton, and recall the monks; and, in caſe of non-compliance, to lay the kingdom under an interdict †.

The name of interdict frightened John, who knew how much he was hated. He offered to comply, if he might be allowed to make a proteſtation of a ſaving his dignity and prerogative; but no ſalvo would be allowed; the interdict was publiſhed, Divine ſervice ceaſed through the kingdom, except in a very few places, where ſome clergymen were found honeſt and bold enough to preach againſt the Pope's proceedings. John, in revenge, fleeced the clergy in a moſt horrible manner; and, what is yet more ſurpriſing, did not deſiſt from oppreſſing the laity. However, as to the points in conteſt, he was not obſtinate; he offered more than once to ſubmit; but Innocent had more extenſive views. There was no remiſſion without he refunded to the churchmen every farthing he had extorted from them, a thing abſolutely out of his power. Then followed, after ſucceſſive delays calculated to ſhew that the holy father would give his undutiful ſon time to repent, a ſentence of excommunication by name, a bull abſolving his ſubjects from their oath of allegiance, and commanding all perſons to avoid his company; and, laſtly, a ſentence of depoſition, and a grant of all his dominions to the king of France, who had been invited alſo by John's ſubjects, whoſe patience had been by this time quite exhauſted with his tyranny, and the ſuſpenſion of the performance of Divine ſervice.

Philip was very ready to execute this ſentence, and aſſembled a numerous army. Randulf was ſent, as the Pope's legate,

† Kennet's hiſtorians. Hume. Carte.

legate, to ſee the ſentence of depoſition put in execution; but, in reality, with ſecret inſtructions of a very different nature; for it was by no means Innocent's intention to give England to France, but to ſubject it to himſelf. John, terrified with the exaggerated account of Philip's armament, and the diſaffection of his ſubjects, ſubmitted in every point before in conteſt, and in one new one, that no clergyman ſhould be outlawed. But this was not ſufficient to avert the danger from Philip, and his own diſaffected barons. To make him ſacred and invulnerable, he became a vaſſal to the Pope, reſigned his kingdom to him by a formal charter, and received it again as a favour, under homage, and a yearly rent of a thouſand marks.

In conſideration of this ſubmiſſion, John was favoured in the point of indemnifying the clergy, which was what had ſo long retarded the accommodation. Innocent took the eſtimating this on himſelf, and having got all he wanted for the See of Rome, forgot his former clients the clergy, and was very moderate with his new vaſſal. However, the interdict was not removed, nor the king abſolved from his excommunication, till Langton was put into poſſeſſion; which when done, John was obliged to renew his homage to ſwear to defend church and clergy againſt all their adverſaries, and to make reſtitution; and then he was abſolved. But there was one curious addition to this oath, which Langton, who was an Engliſhman, and a lover of liberty, certainly inſerted of his own head, that he ſhould reſtore the laws of the Confeſſor: For Innocent would never, we may be well aſſured, have allowed ſuch privileges to his vaſſals. John, however, out of fear of Philip, being in an hurry to be abſolved, made no objection; and indeed he had no reaſon to doubt the Pope would abſolve him from his oath. But Langton and the nobles were reſolved to keep him

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ſtrictly to it. Soon after, while he was in France, his regents ſummoned a parliament, wherein the king's peace was proclaimed, and the laws of Henry the Firſt were revived. Theſe were thoſe he had ſworn to reſtore, being in truth the Confeſſor's with a few additions and alterations by the Conqueror and Henry.

John, however, went on in his old courſes, being now ſure of the Pope's protection, and indeed it was hard to charge him with a breach of Henry's charter, of which, though copies had been lodged in every cathedral and great abbey in England, yet ſo carefully were they deſtroyed, that not one appeared. At length archbiſhop Langton furniſhed them with one, which had eſcaped the general calamity; and this the aſſociated barons, who had determined to reſtrain John, and recover their liberties, made the baſis of their demands, and ſwore to demand, and if refuſed, to vindicate with the ſword, at a meeting they had at Edmundſbury under pretence of devotion. Accordingly, they waited on the king in a military dreſs, and made their demands; but he, ſeeing they were only a party among the nobles, and not imagining the reſt were of the ſame ſentiments, not only refuſed, but with haughtineſs inſiſted they ſhould renounce them, by giving under their hands and ſeals, that they would never make the like demand on him or his ſucceſſors. But his eyes were opened when he found ſcarce two or three of thoſe that were with him would comply. He had recourſe to procraſtination, and promiſed them ſatisfaction at the latter end of Eaſter. In the interim he exacted a new oath of allegiance from his ſubjects; a feeble precaution; for none refuſed it, or thought themſelves precluded by that act of duty from vindicating their rights in what manner they beſt might. To

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ſecure the clergy, he gave them a charter, confirming their immunities, and the entire freedom of their elections; and yet a great multitude continued zealous for the liberty of the ſubject againſt him; but his main dependance was on religion. To render his perſon ſacred, he aſſumed the croſs, as if he intended for the holy war, and implored the protection of his Holineſs, to whom the diſcontented barons alſo repreſented the juſtice of their pretenſions. Innocent, in appearance, received them favourably, adviſed them to repreſent their hardſhips in a decent and humble manner to the king, in which caſe he would interpoſe in favour of all their juſt and reaſonable petitions; but annulled their aſſociation, and forbad them to enter into any new one for the future.

The barons, who ſent to the Pope rather out of reſpect than any expectation of favour, proceeded in the method they began. They and their vaſſals aſſembled in array, in ſuch numbers as to compoſe a formidable army; and when they had particularly ſpecified their demands, and were refuſed, they proceeded to attack him, by reducing his caſtles. Againſt himſelf, as being under the croſs, they made no attempt. On this occaſion, archbiſhop Langton, who was at the bottom of the whole confederacy, outwitted John; who, as they had diſobeyed the Pope, was impatient to have them excommunicated, and this the Pope promiſed to do as ſoon as the foreign troops, which the king had brought over for his defence, had quitted the kingdom; but when they were gone, he broke his engagement, ſo that John, left defenceleſs, was obliged to appoint four nobles to treat with the revolted lords; and, upon conference, ſome points they had inſiſted on before being given up, the liberties of the nation

were

were ſettled, as contained in the two charters of *Magna Charta*, and *Charta de Foreſta* †.

The manner of obtaining theſe charters, and the right the people have to the liberties contained in them, have been the ſubject of much controverſy between the favourers of arbitrary power and the aſſertors of freedom; the one, contending that they were the fruits of rebellion, extorted by force and fraud, from a prince unable to reſiſt, and therefore revocable by him or his ſucceſſors; and the others, that they were the antient privileges of the nation, which John had, contrary to his coronation-oath, invaded, and which they therefore had a right to reclaim by arms. That they were obtained by force, is undoubted, and that John and many of his ſucceſſors looked upon them, therefore, as of no validity, is as clear, even from the argument lord Coke brings for their great weight, their being confirmed above twenty times by act of parliament. To what purpoſe ſo many confirmations, if the kings had not thought them invalid, and had not, on occaſions, broke through them; and were it as clear that they were not the antient rights of the people, it muſt be owned they were extorted by rebellion. But that they were no other than confirmations, appears very plainly from the ſhort detail I have heretofore given of the conſtitution and ſpirit of the monarchy of the Saxons, and all other northern nations.

As to the new regulations introduced in them, as ſome there are, they are only precautions for the better ſecuring thoſe liberties the people were before entitled to, and it is a maxim

† Blackſtone's diſcourſe concerning the hiſt. of the charters. Gurdon's hiſt. of Parliament. Hale, hiſt. com. law, ch. 7.

maxim of all laws, that he who has a right to a thing, hath a right to the means without which he cannot enjoy that thing.

The friends, therefore, to abſolute power, ſenſible that the original conſtitution is againſt them, chooſe to look no farther back than the Conqueſt. Then, ſay they, the Saxon government and laws were extinguiſhed, the Engliſh by the Conqueſt loſt their rights, the foreigners had no title to Engliſh liberties, and the Conqueror and his ſon William acted as deſpotic monarchs. Therefore, their ſucceſſors had the ſame right, and it was treaſon to think of controuling them. But how little foundation there is for this doctrine, may appear from what I obſerved on the reign of the Conqueror. He claimed to be king on the ſame footing as his predeceſſors; he confirmed the Saxon laws, and conſequently both Saxons and foreigners, when ſettled in the kingdom, had a right to them. If he oppreſſed the Engliſh, that oppreſſion did not extend to all; and to thoſe it did, it was not exerciſed as upon conquered ſlaves, but as upon revolted rebels. But, for argument ſake, to allow that the Engliſh became ſlaves, and that the foreign lords had no right to the Saxon privileges, both which are falſe, how came the king to be deſpotic ſovereign over them? They were partly his own ſubjects, freemen, according to the feudal principles, who ſerved him as volunteers, for he had no right to command their ſervice in England; or volunteers from others princes dominions, and to ſay that freemen and their poſterity became ſlaves, becauſe they are ſo kind as to conquer a kingdom for their leader, is a moſt extraordinary paradox.

But

But William the Conqueror, in ſome inſtances, and his ſon in all, acted as deſpotic princes; therefore they had a right ſo to do. I anſwer, the triumvirs proſcribed hundreds of the beſt Romans, therefore they had a right. It is as unſafe to argue from matter of fact to matter of right, as from matter of right to matter of fact. It is as abſurd to ſay, Tarquin ruled abſolutely, therefore the Romans were rightfully his ſlaves, as to ſay the Romans had a right to liberty under him, therefore they were free.

But it may be ſaid, the people quietly ſubmitted and new rights may be acquired, and new laws made, by the tacit conſent of prince and people, as well as by expreſs legiſlation. I allow it where the conſent is undoubtedly voluntary, and hath continued uninterrupted for a long ſpace of time; and how voluntary this ſubmiſſion was, we may judge from the terms they made with Henry the Firſt, before they ſuffered him to mount the throne. Beſides, there are ſome points of liberty, eſſential to human nature, that cannot, either by expreſs or tacit laws, be given up, ſuch as the natural right that an innocent man has to his life, his perſonal liberty, and the guidance of his actions, provided they are lawful, when the public good doth not neceſſarily require a reſtraint. In ſhort, never was there a worſe cauſe, or worſe defended; and this maxim was what influenced the conduct of the Stuarts, and precipitated that unhappy houſe to their ruin.

John, who entertained the ſame ſentiments had no reſource to recover his loſt rights, as he thought them, but the aſſiſtance of the Pope, and an army of foreigners. The firſt very cordially eſpouſed his intereſt. He was provoked that he, who had humbled kings, ſhould be controuled by petty lords, and that by theſe privileges he ſhould

ſhould be prevented from reaping that golden harveſt he expected from England. He annulled the charters, commanded them to recede from them, and, on their diſobedience, excommunicated them, firſt in general, and then, by name.

About the ſame time arrived an army of veteran foreigners, that came to aſſiſt John, who had, in imitation of the Conqueror, diſtributed to them the eſtates of the barons. With theſe and a few Engliſh lords, he took the field, and ravaged the country with a more than Turkiſh barbarity. The confederate barons ſaw the liberties they had contended for annulled, their lives and eſtates in the moſt imminent danger, and, in a fit of deſpair, invited Lewis, prince of France, to the crown, who, bringing over an army, ſaved them from immediate deſtruction. However, this ſtrengthened John. It was not for any to ſtand neuter. Few choſe to embark in an excommunicated party, and many, who ſaw ſlavery unavoidable, and nothing left but the choice of a maſter, preferred their countryman for a king to a foreigner. The loſs of liberty now ſeemed certain, which ever prevailed; when the haughtineſs of Lewis, and his want of confidence in the Engliſh noblemen who joined him, concurring with the death of John, and the innocence of his infant ſon, providentially preſerved the freedom of England.

LECTURE XXXVIII.

The minority of Henry III.—Eccleſiaſtical grievances—The diſpenſing power—The canon law—Confirmation of Magna Charta—A commentary on Magna Charta, in ſo far as it relates to what now is law.

JOHN left his minor ſon under the guardianſhip of the earl of Pembroke, a nobleman of great abilities, and the ſtricteſt integrity. The firſt ſtep he took for the benefit of his pupil, was the confirmation of the charters, and the next was a negotiation with the revolted lords, who began to be diſcontented with the prince of France; which ſucceeded ſo happily, that in a ſhort time he brought them all over with very little bloodſhed, and Lewis was obliged to quit the kingdom. Peace being re-eſtabliſhed, the regent applied himſelf with all diligence to reſtore the peace of the kingdom, and juſtice to her regular courſe: And had he lived long enough to form the conduct and principles of the young king, England never had a fairer proſpect of happineſs; but he ſoon dying, and his ſucceſſors being men of a different ſtamp, ſuch principles were ſown in the monarch's mind, as, in the event, produced bitter fruit both to him and the whole kingdom.

This reign was as calamitous as the preceding one, and rather more ſhameful; and what added to the misfortune, it laſted three times as long. As ſoon as Henry came of age, he revoked *Magna Charta*, as being an act of his nonage,

nage, ſoon after he confirmed it, then broke it, then confirmed it by oath, with a ſolemn excommunication of all that ſhould infringe it; then he obtained from the Pope a diſpenſation of his oath, and broke it again. And thus he fluctuated for fifty years, according as his hopes or fears prevailed. However, in general, the charter was pretty well obſerved. The great point it was infringed in, was the levying money without the parliament, and in this he frequently prevailed, being aſſiſted by his Lord Paramount, the Pope. They joined in levying taxes, and then divided the ſpoil between them. Indeed, their Holineſſes had, upon each occaſion, by much the greater ſhare; for they not only fleeced the clergy ſeparately, but drew vaſt ſums from the king, on pretence of a fooliſh project of making his younger ſon king of Sicily; all which they ſquandered on their private occaſions.

In this reign they introduced the practice of proviſorſhip, againſt which ſo many acts of parliament have been made. It went on this maxim, That the Pope was univerſal paſtor of the church, and conſequently ſole judge who ſhould be his deputy in any particular place. The inference neceſſarily followed, that the rights of patronage to livings, whether in a Biſhop or lay patron, were, ſtrictly ſpeaking, no rights at all, being ſuch only where the Pope did not chuſe to interfere. But this privilege would have been of little ſignificance, if they could act only in the vacancy of a living; for it would generally have been filled up before he could have notice. Bulls of proviſorſhips were, therefore, invented. Theſe were charters of the Pope, directed to the biſhop, acquainting him, that he had provided for ſuch a perſon, by appointing him to ſuch a benefice, when it ſhould become vacant, or the firſt benefice of ſuch a value that ſhould fall; ſtrictly forbidding the Biſhop to admit

any other perſon, upon any account whatſoever. Sometimes the perſon provided for was not named; but notice was to be given when the vacancy happened. In proceſs of time a number of livings were reſolved in the ſame bull; nay, one went ſo far as to forbid any living that ſhould fall to be filled, till the Pope had provided for three hundred perſons. Such were the delightful conſequences of John's homage, and of England becoming St. Peter's patrimony; ſo that the monkiſh hiſtorians tell us that Rome ſheared all Europe; but in England they flayed off the ſkin. An account was taken at one time of the value of Engliſh benefices poſſeſſed by Italian prieſts, non-reſidents, and it was found to exceed the ordinary revenue of the crown. All theſe bulls concluded with a *non obſtante*, that is, notwithſtanding any laws, cuſtom, privilege, right or patronage, or any thing elſe whatever; and this hopeful precedent Henry the Third adopted in his charters, thereby, if he could not repeal, at leaſt making ineffectual the laws of the land; and thus began the king's claiming a *diſpenſing power* over the laws †.

In this meridian of the Pope's power was the canon law introduced into England, and it began to uſurp conſiderably on the civil courts; inſomuch that, had not the common law judges exerted themſelves to check the eccleſiaſtical court by prohibitions, which they did even in this reign, it would have gained the ſame aſcendant that it has in the Pope's territory.

The latter end of this reign was filled with a ſucceſſion of troubles, occaſioned by the repeated breaches of the charters,

† Sir Robert Atkins on the diſpenſing power. Bibliotheca Politica. The general hiſtories of England.

charters, and fomented by the ambition of ſome of the great nobles; however, in the end, the king prevailed, by the aſſiſtance of his ſon; but it was found expedient, even in the midſt of victory, in order to prevent future convulſions, to eſtabliſh the liberties of England, by confirming *Magna Charta*; and they have ever ſince ſtood their ground. I ſhall therefore proceed briefly to ſpeak to *Magna Charta*, and in ſo doing ſhall omit almoſt all that relates to the feudal tenures, which makes the greateſt part of it, and confine myſelf to that which now is law.

The firſt chapter of *Magna Charta*, as confirmed in the 9th year of Henry, which is that now in force, and differs from that of John in ſome omiſſions, concerned the freedom of the church, in which was principally included the freedom of elections to Biſhopricks, which, ſince the reformation, has been taken away. I ſhall, therefore, proceed to thoſe that concern the laity; the five next are feudal, and the ſeventh is concerning widows. It firſt gives them free liberty to marry or not; whereas, before, ſuch as were called the *king's widows*, that is, thoſe who held lands, or whoſe huſbands held lands of the king, had been obliged to pay for licenſe to marry if they had a mind, or were diſtrained to marry, if they had no mind, which it is unneceſſary to ſay was a grievous oppreſſion. It reſtrains the taking any thing from the widow for her dower, or for her own land, which her huſband had held in her right. It provides for her *quarantine*, that is, gives her leave to ſtay forty days in her huſband's houſe, unleſs ſhe had dower aſſigned to her before, and within that time orders the third part of her huſband's land to be aſſigned her by the heir, as her dower; and that, in the interim, ſhe ſhould have reaſonable eſtovers †.

The

† Ruffhead, vol. 1.

The next is in favour of the *king's debtors*, and their ſecurities. By the old law, the king's profit was ſo highly favoured, that he could, to ſatisfy his debt, ſeize the chattels or extend, that is, take the profits of the real eſtate of his debtor, at his pleaſure; or he might, in the firſt inſtance, come on the ſecurity, without attacking the principal debtor. For remedy hereof, it forbids the king, or any of his officers, ſeizing the land, while the debtor's perſonal chattles are ſufficient. It forbids, alſo, the diſtraining the ſecurities, while the debtor's chattels were ſufficient. If they were not, the king had the option either to ſeize the land of the debtor, or diſtrain the ſecurities; and if the latter was done, it provides, that the ſecurities ſhould have the land, until they are reimburſed. Immediately after this, in king John's charter, followed the law prohibiting the king from levying any talliage or tax on the ſocage tenants, or on boroughs, without aſſent of parliament, which is here omitted; and this king and his ſon Edward aſſerted and exerciſed the rights; but the laſt was at length obliged to give it up, in the famous ſtatute *de tallagio non concedendo*, and not till then were theſe ranks of the people entirely emancipated. This omiſſion for a time rendered illuſory the next, the ninth chapter, which provides that the city of London and all the other cities, boroughs, and ports, ſhould enjoy all their ancient liberties and cuſtoms; for theſe would be of little uſe whilſt arbitrary taxation remained. The tenth is in affirmance of the common law, that no perſon ſhould be diſtrained for more rent or ſervices than he owed out of the land. If he was, he had a double remedy, either by *a ſuit in replevin*, or by the writ called *ne injuſte vexes*. The next is for fixing the court of Common Pleas, of which I ſpoke already. The twelfth was for the eaſe of the people, by taking aſſizes in the country. But thoſe actions are out of uſe now. The thirteenth is concerning aſſizes

too.

too. I haſten therefore to the fourteenth that treats of *amerciaments*.

Amerciaments come from the word *mercy*, and are ſo called from the words in the record, *ſit in miſericordia pro falſo clamore ſuo*, and were properly, though the word hath been ſince extended, what a plaintiff or defendant that had troubled the king's courts ſhould pay by way of puniſhment for maintaining an unjuſt ſuit; whereas *fines*, to which they bear a reſemblance, and with which they have ſometimes been confounded, were for offences, and aſſeſſed by the court; as were amerciaments alſo ſometimes, and very grievouſly, though entirely againſt law. This act reſtores the common law; orders the amerciaments to be proportioned to the nature of the caſe, and alſo, in regard to the man's circumſtances, ſo that he ſhould not be ruined thereby; that no freeholder ſhould be amerced in ſo heavy a manner as to deſtroy his freehold; no merchant, his merchandize; no villain, his carts, whereby he would be unable to do his lord's ſervices; no eccleſiaſtic according to the value of his benefice, but only according to his lay property. And that this might be conſtantly obſerved, the amerciaments were to be aſſerted, or ſettled by the man's peers. It may be aſked, what remedy had the man, who was too ſeverely amerced by his peers? On this act was grounded the writ of *moderata miſericordia*, whereby this amerciament may be tried by another jury, and moderated.

The fifteenth provides, that none ſhould be diſtrained to repair bridges, or landing places, but who are bound by their tenures or cuſtom. The ſixteenth for the free navigation in rivers, and unloading of goods. The ſeventeenth takes away the power of trying pleas of the crown from ſheriffs,

ſheriffs, conſtables and coroners, and other inferior officers; a very neceſſary law, upon account of the great value of the life of an individual, eſpecially as none but the king's courts could give the benefit of clergy. However, ſheriffs and coroners can take *indictments*; for that is not *trying*, but bringing the matter into a method of trial. The eighteenth concerns debts due to the king where his debtor is dead. By this law, the firſt duty of executors is to pay the debts of the deceaſed; thoſe of the higheſt nature, not as to *value*, but in *quality*, in the firſt place, then the lower ones: and if the effects were not ſufficient, it was in their option to pay one creditor of the ſame nature without another, ſo that they obſerved the rule of not paying the lower debtor before the higher. But the king, be his debts of what nature they would, by his prerogative, had the preference of all creditors, and by colour hereof his officers often ſeized and embezzled the effects of the deceaſed, to the prejudice of other creditors and legatees. This orders the ſheriff to attach and value the goods by a jury of twelve men, to the value of the debt, which were to remain unremoved, till the king was paid; and then the whole, or, if not, the overplus, to be reſtored to the executors. The two next are feudal. The twenty-firſt relates to purveyorſhip, which has been aboliſhed.

The twenty-ſecond relates to the king's right to the lands of felons. On which there is ſomething curious to be obſerved. By attainder of felony, the goods and chattels of the felon are forfeited to the king, and the land to the lord from whom they were holden; but in caſe of treaſon, both were forfeited to the king. Such was the feudal law; but by the law of England, in order to deter perſons from committing felony, and to make the lords more careful what kind of tenants they choſe, the king had

had an intereſt in the land of felons; not for his own benefit indeed, but for the terrifying by example. He had a right to commit waſte in them, to cut down the trees, to demoliſh the houſes and improvements, and to plow up the meadows; and for this purpoſe he was allowed, by common law, a year and a day. To prevent this deſtruction, the lords, to whom the land eſcheated frequently, by a fine, bought off the king's right of waſte; but if they did not, his officers would take the profits for the time, and then hold it longer, till they had committed the waſte. This act prohibits the retaining the land longer than a year and a day, and directs that then it ſhould be reſtored to the lord. This new law was certainly intended for the public good, to prevent this malicious waſting, which the king's officers would be ſure to commit, if they were not properly, as they thought, conſidered; and to give the king, in lieu of the waſte that he had a right to make, a lawful profit, which his officers had unlawfully, to their own uſe, we may be ſure, extorted before. It gives the cuſtody of the lands for that time, and conſequently the profits. But obſerve the conſequence.

The king now had the cuſtody, as alſo the profits, by a legal title for a year and a day, unleſs the lord pleaſed to compound with him, and ſo intitle himſelf to the immediate poſſeſſion. But this did not ſatisfy the greedineſs of the officers of the crown. It was eaſy to gather the profits until very near the time the king's right expired, and then, for a week or fortnight before it was out, they had it in their power to commit waſte enough, if the lord, who was intitled by the eſcheat, did not buy them out. This was certainly againſt the ſpirit of the law whereof we are ſpeaking, which was intended to give the king a real profit, inſtead of a right deſtructive to the community in general;

neral; but the waſte was not prohibited expreſsly, and this was pretext enough for theſe officers to exact compoſition for not doing it within the year. It was accordingly claimed and paid, and accounted for as due to the king, on that old maxim, That general laws do not change the prerogative royal, but by expreſs words. This was the doctrine and practice in the courts of the third Henry, and convenient enough for him, who was always indigent. But what was the opinion of the lawyers of that age, we may learn from Bracton, Britton, and the authority of Fleta; the firſt of which wrote in the latter end of this reign, and the other two in the reign following. Bracton ſays expreſsly, that "the king's power over the lands of "felons convicted, was becauſe he had a right to throw "down the buildings, unroot the gardens, and plow up "the meadows; but becauſe ſuch things turned to the "great damage of the lords, it was provided, for common "utility, that ſuch houſes, gardens, and meadows, ſhould "remain, and that the king for this ſhould have the ad-"vantage of the whole land for a year and a day, and ſo "every thing ſhould return entire to the lord. Then he "goes on, but now both is demanded, namely, a fine for "the term, likewiſe for the waſte, nor do I ſee the reaſon "why†." Thus far Bracton. Britton ſays, ſpeaking in the perſon of the king, of felons, for in that manner his book is written, "Their moveables are ours; their heirs "are diſinherited; and we will have their tenements, of "whatſoever holden, for a year and a day, ſo that they "ſhall remain in our hands that year and day, and that "we ſhall not cauſe to periſh the tenements, nor hurt the "woods, nor plow the meadows, as hath been accuſtomed "in time paſt‡." Fleta talks in the ſame ſtrain, in commenting

† Lib. 3. p. 129. 137. ‡ Cap. 5.

menting on this law of *Magna Charta*, which he expreſsly quotes, that, as a mark of brand on felony, it had been antiently provided that the houſes ſhould be thrown down, and ſo goes on to enumerate the other ſpecies of waſte, which I need not here repeat, as I have mentioned them already; and then he ſays "becauſe by ſuch doings great "damage would accrue to the lords of the fiefs; for com-"mon utility it was provided, that ſuch hardſhips and ſe-"verities ſhould ceaſe; and that the king, in conſideration "thereof, ſhould, for a year and a day, enjoy the com-"modity of the whole land; after which term it ſhould "return to the lords of the propriety entirely, without "waſte or deſtruction†." The *Mirror*, another antient law-book, joins with theſe; and this book, which was written in the ſame reign of Edward the firſt, or, at the lateſt, in that of his ſon, ſays, "the point of felons lands "being held for the year is diſuſed; for by that, the king ought not to have but the waſte by right, or the year, in "name, (that is, in nature) of a fine; to ſave the fief "from *eſtrepement* (that is, waſte), the miniſters of the king "take both the one and the other‡." A melancholy conſideration, that, under his name, and in pretence of his profit, though not really to his advantage, ſuch a law ſhould, for their own profit, be eluded by his miniſters; as by theſe teſtimonies, one cotemporary, and the reſt immediately ſubſequent, we are informed it was contrary to the intention of this chapter of *Magna Charta*; but the practice prevailed for a long time after. I ſhall conclude this lecture with the words of Lord Coke on this chapter of *Magna Charta*. "Out of theſe old books you may ob-"ſerve, that when any thing is given to the king, in lieu "or ſatisfaction of *an antient right of his crown*, when once "he

† Lib. 1. cap. 28. ‡ Cap. 5.

" he is in poſſeſſion of the new recompence, and the ſame " in charge, his officers and miniſters will many times de- " mand the old alſo, which may turn to great prejudice, if " it be not duly and diſcreetly prevented †".

† 2 Inſt. p. 37.

LECTURE XXXIX.

Continuation of the commentary on Magna Charta.

THE twenty-third chapter of *Magna Charta* prohibits *fiſh weires* in rivers, which are great annoyances to navigation, and the free liberty of fiſhing; and which have ſtood their ground in ſpite of all the laws that can be made againſt them. The next relates to the inferior courts of Lords of Manors, and to writs of *Præcipe in capite*; which having gone into diſuſe, with the feudal tenures, I ſhall paſs them over. The twenty-fifth orders, that meaſures and weights ſhould be one and the ſame through the whole kingdom; witneſs the difference between Troy weight and Averdupois; the wine gallon and ale gallon. Eſtabliſhed cuſtoms, which of neceſſity muſt come into daily practice, are hard to be rooted out by poſitive laws; and indeed it is more prudent to let them continue. For the confuſion that ſuch an alteration of things in daily or hourly practice would occaſion, would be more detrimental, for a conſiderable time at leaſt, than the uniformity intended to be introduced would be attended with advantage †.

The twenty-ſixth is concerning the writ *De odio et atia*, that is, of hatred and malice; which, though not aboliſhed, hath long ſince been antiquated; but, as it was an antient

† 2 Inſt. 38. 41. Barrington on the Statutes, p. 15. 16.

tient proviſion for reſtoring the liberty of the ſubject, I ſhall take ſome notice of it. It was a maxim of the common law, that no man impriſoned for any offence, which, if proved, would touch his life or members, could be bailed out but by the ſupreme criminal court, the King's Bench; which, upon danger of death, or ſuch other ſpecial cauſes as appeared ſufficient to them, had that power. Hence, in thoſe unſettled and oppreſſive times, it became a practice for malicious perſons to have a man clapped up in priſon for a capital offence, without either indictment or appeal brought againſt him; and there he was of neceſſity to lie, until the juſtice in eyre came into the county to deliver the gaols, which regularly was but once in ſeven years; to avoid this hardſhip, the writ we are now ſpeaking of was invented, and iſſued out from time to time, as occaſion required, out of the Chancery. Beſides, by this chapter of *Magna Charta*, it is ordered to be granted without any purchaſe or reward; whereas, before, all the original writs were purchaſed at the price the chancellor pleaſed to ſet on them, which was a grievous oppreſſion. It ordered the ſheriff to make inquiſition in the county court, by the oath of a jury, whether the impriſonment proceeded from malice or not. If they found it did, upon its return, the perſon accuſed had a right to a writ, ordering the ſheriff to bail him by twelve *manucaptors*, or ſecurities. But, this was only where there was no indictment, or appeal; for theſe were accuſations of record, and therefore the finding the charge malicious in the county court, which was no court of record, could not avail againſt them. This writ has gone into diſuſe, ſince juſtices of gaol-delivery have continued to go into every county twice a year; a proceeding which has evidently ſuperſeded the neceſſity of it †.

The

† Mirror, cap. 5. ſect. 2. Glanvil, lib. 14. cap. 3. Bracton, lib. 3. p. 121. Fleta, lib. 1. cap. 23.

The twenty-ſeventh chapter reſtrains the unjuſt practice in the king of arrogating to himſelf the wardſhip of his ſocage or burgage tenants, where they held lands by military ſervice from others, his ſubjects. The whole military ſyſtem hath ſince been diſſolved by act of parliament, and therefore it will be unneceſſary for me to explain or enlarge upon the nature of the miſchief complained of in this chapter. The next forbids any judge or officer of the king to oblige a man to *wage his law*, that is, ſwear to his innocence, except in a cauſe where a ſuit was inſtituted againſt him; but *wager of law*, being now totally fallen into diſuſe, I haſten to the twenty-ninth chapter, the corner-ſtone of the Engliſh liberties, made in affirmance of the old common law †.

By the bare reading of this chapter, we may learn the extravagances of John's reign, which it was intended to redreſs. It conſiſts of two parts. The firſt runs thus: *Nullus liber homo capiatur, vel impriſonetur, aut diſſeiſetur, de libero tenemento ſuo, vel libertatibus vel liberis conſuetudinibus ſuis aut utlagetur aut exuletur, aut aliquo modo deſtruatur, nec ſuper eum ibimus, nec ſuper eum mittimus, niſi per legale judicium parium ſuorum, vel per legem terræ.* Firſt, then, to ſee to whom this act extends: the words *liber homo*, in antient acts of parliament, is, in general, rightly conſtrued *freeholders*, and ſo it means here, in the ſecond branch which prohibits diſſeiſins; for none but a freeholder is capable of being diſſeiſed, no others being ſaid to have a ſeiſin of land. But it muſt not, throughout the whole of this act, be confined to this limited ſenſe. The firſt breach ſpeaks of the reſtraint of liberty; the third, of unjuſt outlawries; the fourth, of unjuſt baniſhment; the fifth, of any

† 2 Inſt. p. 43. 45.

any kind of deſtruction, or wrongs; which, offered to an innocent perſon, are againſt the natural rights of mankind, and therefore, the remedy muſt extend to all: and ſo it hath always been underſtood; for women are included in it, and ſo are villeins, for they are free men againſt all but their lord.

Let us next conſider the end of this part, which is an exception running through the whole; *niſi per legale judicium parium ſuorum, vel per legem terræ.* That is, by the common law, which doth not, in all theſe caſes, require a trial by peers; a thing indeed impoſſible, where the party doth not appear; in which caſe there is a neceſſity of proceeding to judgment another way. Coke obſerves, the words *legale judicium parium ſuorum* include the trial both of lords and commons, the finding of the latter being upon oath, and called *Veredictum*, and in which all muſt be unanimous; wherein it differs from the trial of lords, for they find not upon oath, but upon honour; and it is not neceſſary that all ſhould agree, the majority, provided that majority conſiſts of twelve, being ſufficient †.

Upon this a queſtion may be put, who are the peers of a woman of quality? If ſhe be noble by blood, that is, a peereſs, (for I ſpeak not of the nobility by courteſy, which is merely nominal) there is no doubt but the barons and other noblemen; if ſhe be ennobled by marrying a peer, ſhe becomes in law one perſon with her huſband, and therefore muſt have the ſame peers with him, which right continues after her huſband's death, unleſs ſhe marries a commoner; for then, being one perſon with him, ſhe becomes a commoner; whereas a peereſs, in her own right, marrying

† 2. Inſtitut. p. 48. 49.

+ are her peers;

marrying a commoner, forfeits not her dignity, though ſhe becomes one perſon with him. She was not ennobled by her own act, and therefore, by no act of her own can deſtroy that nobility ſhe has by the gift of God, or the king, by means of her blood, which ſhe cannot alter.

Two exceptions, however, there are to the rule of every Engliſhman's being tried for offences by his peers; but neither of them againſt the purport of this ſtatute. Firſt, the ſtatute ſpeaks in the disjunctive, *per legale judicium parium ſuorum, aut per legem terræ:* now the *lex terræ*, the common law, in the univerſal practice of it, allows theſe exceptions; nor will they be found to be againſt the letter; for the words are *nec ſuper eum ibimus, nec ſuper eum mittemus*, ſpeaking in the perſon of the king; which ſhews that it is meant of the accuſation or other ſuit of the king. Now theſe exceptions are not at his ſuit. One of theſe exceptions I mentioned in a former lecture. It is where a commoner is impeached by the commons in parliament; and the reaſon I then gave, is, I think, plain and ſatisfactory, that every jury that could be ſummoned is ſuppoſed a party to the charge brought by their repreſentatives, and therefore, as the man is accuſed as an enemy to the king by the body of the people, that there may not be a failure of juſtice, the lords, as the only indifferent perſons, muſt be the judges.

The other exception may ſeem more extraordinary. It is that a lord of parliament appealed, that is, accuſed of a crime, by a private perſon, not for the ſatisfaction of public juſtice, but of his own private wrong, ſhall not be tried by his peers, but by a jury of commoners. When this law was introduced, the lords were few in number, immenſely rich and powerful, linked together frequently by alli-

ances, almoſt always by factions. In this towering ſituation, they looked down on the lower ranks with diſdain; frequently injured and oppreſſed them; and little proſpect would the poor commoner have of redreſs, were the criminal to be tried by thoſe of his own rank, ſeveral of them his relations, moſt of them liable to be ſuſpected of the ſame offences; eſpecially, as the law will not allow a lord to be challenged. Neither did the lord run any extraordinary riſk of being unjuſtly condemned. The lower rank of people in all countries and ages have been uſed to look with reſpect on perſons poſſeſſed of great wealth and power, inveſted with titles of honour, and dignified by blood of an antient deſcent. But, in thoſe military ages, ſuch veneration was highly encreaſed by that valour and perſonal bravery, which diſtinguiſhed every one of the nobility, and than which no virtue is more apt to captivate, in general, the hearts of mankind. Beſides, that the lord had his advantage of challenging ſuſpected jurors; whereas, if tried by his peers, he had not ſuch privilege of exception, though they were ever ſo notoriouſly his enemies. Every commoner almoſt, how great ſoever, was, in thoſe days, under the influence of ſome one or other of the lords, and there could be little doubt but that influence would be exerted, and ſucceſsfully too, unleſs the guilt was too clear and evident.

It may here be aſked, When a civil ſuit is depending between a lord and a commoner, how the iſſue is to be tried, whether by the lords alone, or by commoners only, or by a jury compoſed of an equal number of each; in the ſame manner, as, when an alien is tried, it is by a jury half natives, half aliens? The anſwer is, it ſhall be tried by a jury of commoners; only, on account of the dignity of the lord, there

there muſt be a knight on the jury. I need not enlarge on the reaſon, as it is the ſame with the former, the leſſer danger of partiality.

I now come to the other part of the disjunctive, *aut per legem terræ*; and it will be neceſſary to point out in general (for to deſcend into particulars, would carry me a great deal too far) the principal caſes, where this *lex terræ* ſuperſedes the trial *per pares*. Firſt, then, if a man accuſed of a crime pleads guilty, ſo that there is no doubt of the fact, it would be an abſurd and uſeleſs delay to ſummon a jury, to find what is already admitted: accordingly, by the *lex terræ* judgment is given on the confeſſion. So in a civil action, if the defendant confeſſes the action, or if he appears, and afterwards, when he ſhould defend himſelf, makes default, and will not plead (which caſe is equivalent to confeſſion) no jury is requiſite. So, if both parties plead all the matters material in the caſe, and a demurrer is joined, that is, the facts agreed on both ſides, and only the matter of right, depending on the facts already allowed, in conteſt, the judges ſhall try by demurrer, and give judgment according to *law* without a jury. The general rule is, that a jury ſhall try *facts*, and the judges the *law*; for it would carry a face of abſurdity to expect from a common, or indeed, from any jury, a deciſion of a point of law that is controverted between the lawyers of the plaintiff and defendant, who have made that ſcience their particular ſtudy. Beſides, as the law inflicts ſo heavy a puniſhment on jurors who give a falſe verdict, it would be the utmoſt cruelty to force men unpractiſed in law to run ſuch a hazard, where it muſt be ſuppoſed an equal chance, at leaſt, they may miſtake. The ſame dangers that the jurors would run by miſtaking the law, hath, in points complicated both of law

and fact, introduced *ſpecial verdicts*, that is, the finding of all the facts by the jury, and the leaving the matter of right to be judged by the court, who beſt knew the law: but this by way of digreſſion.

All the proceedings of courts to bring cauſes to a hearing previous to the impannelling a jury, and the carrying judgments into execution, are *per legem terræ*, or, as my Lord Coke expreſſes it, the due proceſs of the law is *lex terræ*. The inflicting of puniſhment by the diſcretion of courts for all contempts of their authority, without the intervention of a jury, is alſo, I think part of the *lex terræ*, and founded in the neceſſity of enforcing due reſpect and obedience to courts of juſtice, and ſupporting their due dignity. The outlawing a perſon who abſconds, and cannot be found, ſo as to oblige him to anſwer a charge againſt him, whether civil or criminal, is one of theſe proceedings *per legem terræ* without a jury; of which, as I have now occaſion, it will not be amiſs to give a ſhort account, as it is in daily practice †.

By the very antient law of England, the conſequence of outlawry was very troubleſome. Not only a ſeizure of the perſon, lands and goods, was lawful, but he was looked upon, not, merely, as one out of the protection of the law, but alſo as a public enemy; for whoever met him had a right to ſlay him. This barbarous law undoubtedly proceeded hence, that no perſon was then ever outlawed but for a felony; that is, a crime whoſe puniſhment was death; but it was a moſt abſurd thing to allow every private perſon to execute the offender, who by refuſing to anſwer has confeſſed

† 2. Inſtitut. p. 51.

feſſed himſelf guilty: and the abſurdity became more glaring, when, about Henry the Third's time, proceſs of outlawry began to be extended to all treſpaſſes committed *vi et armis*, when the conſequences were ſo dreadful. Such extenſion ſeems ſurpriſing; yet the turbulent condition of the times will, in ſome meaſure, account for it; when, under pretence of dormant titles, forcible poſſeſſions, not without frequent bloodſhed and murders, were daily taken by the adherents of the king or barons, as their reſpective parties prevailed. But when the times grew peaceable, this bloody maxim wore out, and in the beginning of Edward the Third's reign, it was reſolved by all the judges, that the putting any man to death, except by the ſheriff, and even by him without due warrant in law, however outlawed and convicted, was murder; and ſince the forementioned times, as the number of people encreaſed, and the opportunities of concealment and abſconding along with them, it has been found neceſſary to grant the proceſs of outlawry in many civil actions.

I ſhall briefly point out the proceedings therein, to ſhew the abundant care the law of England takes, on the one hand, to do juſtice to the plaintiff, if the defendant abſconds, and will not appear; and, on the other, that the defendant may have all poſſible opportunity of notice before the outlawry be pronounced againſt him. Firſt, there iſſue three writs ſucceſſively, to take the body of the defendant, if found in his balywick or county, and to bring him to anſwer. The firſt is called a *capias*, from that mandatory word in the writ. When the ſheriff cannot find him in his bailywick, he returns a *non eſt inventus* on the back of the writ, on which there iſſues a ſecond *capias*, called an *alias*, from its reciting that *alias*, or before this, the

the like writ had iſſued. On the ſame return of *non eſt inventus* to this (for if upon any of the proceſſes the defendant is taken, or comes voluntarily in, ſo as to anſwer, the end is obtained, and no farther proceedings to outlawry go on), the third writ iſſues called a *pluries*, that is, twice before, commanded to take him. The ſending theſe three writs, one after the other, in order to bring in the party is, I preſume (as, undoubtedly, many of the antient practices in our courts of law are) borrowed from the civil law; for by that law they iſſued three citations, at the diſtance of ten days, one after another, to call in the party to anſwer.

But as, upon a return of a *non eſt inventus* on the third *capias*, the perſonal apprehending the defendant may well be deſpaired of, the law proceeds another way; in order, if poſſible, to give him notice, that is by iſſuing the writ of *exigent*, ſo called from the Latin word *exigere*, to *require*, or *call upon*. This writ commands the ſheriff to call the defendant in his county-court, where all the perſons of the county are ſuppoſed to have buſineſs, or at leaſt ſome that can inform him might have. The words are, *We command you that you cauſe ſuch a one to be required from county-court to county-court, until according to the law and cuſtom of our realm, he be outlawed if he doth not appear. And if he do appear, him to take, and ſafely keep, and ſo forth.* Now the law and cuſtom of the realm requires, in this caſe, that the party ſhould be called on five different county-court days, one after another, before he can be outlawed; and theſe courts being held at the diſtance of four weeks from each other, the interval amounts to ſixteen weeks, beſides the time of the three previous *capias's*; a time ſo abundantly ſufficient,

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as it is ſcarce to be preſumed poſſible a perſon living in the county ſhould not have notice; and conſequently, on his not appearing in the fifth court, the coroners of the county, whoſe duty it is, give judgment of outlawry againſt him.

Such is the care the common law takes to prevent outlawries by ſurprize. But the act of the thirty-firſt of Elizabeth in England, enacted here in the eleventh of James, had ſuperadded another caution, namely three publick proclamations. The reaſon of this ſupperadded caution was, I preſume, on account of the dwindling of the buſineſs in the county-courts, and, in conſequence, their being not ſo well attended. This writ, commanding the ſheriff to make proclamation, iſſues with the *exigent*, and recites it, and the cauſe for which the proceeding to an outlawry is, and directs him to proclaim the party three ſeveral days; firſt in the county-court, ſecondly at the quarter-ſeſſions, a court of more reſort, and laſtly on a Sunday immediately after Divine ſervice, at the moſt uſual door of the church of the pariſh, where the perſon dwelt at the time the *exigent* iſſued; or if no church, in the church-yard of the pariſh; or if no pariſh, at the neareſt church, and all outlawries in perſonal actions, where theſe ſolemnities are not obſerved, are declared void.

I have been the more particular on this head, to ſhew the abundant care the law has taken in theſe proceedings, and to vindicate it from the common complaint, of outlawries being obtained ſurreptitiouſly, and without notice. I am ſenſible ſuch complaints are generally without foundation; but if in any caſe they are juſt, the fault is not in the law, but

but in man, in the laws not being duly executed; and if we are to complain of the beſt laws, until they be in all caſes perfectly and uprightly executed, we ſhall never ceaſe complaining while human nature is what it is, weak and corrupt †.

† 2 Inſt. p. 51. 55.

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LECTURE XL.

Continuation of the commentary on Magna Charta.

HAVING mentioned the ſeveral kinds of proceeding to judgment without the intervention of juries, practiſed by the courts of common law, and authoriſed under the words of this ſtatute, *per legem terræ*, it will be proper, before I quit this head, to ſay ſomething of other kinds of courts which do not admit this method of trial; which, yet, have been received, and allowed authority in England; and whoſe proceedings, however different from thoſe of the common law, are juſtified by the ſame words, *per legem terræ*. Theſe are the courts *eccleſiaſtical*, *maritime*, and *military*.

If we trace back the origin of eccleſiaſtical juriſdictions, we ſhall find its ſource in that advice of St. Paul, who reproves the new chriſtians for ſcandaliſing their profeſſion, by carrying on law-ſuits againſt each other before heathen judges, and recommends their leaving all matters in diſpute between them to the deciſion of the *Eccleſiæ*, or the congregation of the faithful. In the fervour of the zeal of theſe times, this counſel was ſoon followed as a law. The heathen tribunals ſcarce ever heard of any of their controverſies. They were all carried before the biſhop, who, with his clergy, preſided in the congregation; and who, from the deference the laity paid them, became at length the ſole judges, as, in after ages, the biſhop became

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ſole judge, to the excluſion of his clergy. Theſe judges, however, being, properly ſpeaking, only *arbitrators*, had no coercive power to enforce their judgments. They were obliged, therefore, to make uſe of that only means they had of bringing the refractory to ſubmiſſion, namely, excluding them from the rights of the church, and warning other Chriſtians againſt their company, and indeed, it was an effectual one; for what could a Chriſtian, deſpiſed and abhorred by the heathen, and ſhut out from the commerce of his brethren, do, but ſubmit? Beſides, if he was really a Chriſtian, this proceeding ſeems founded on the words of the Apoſtle, "He that will not hear the *eccleſia*, "the congregation, let him be unto thee as an heathen†".

Thus was *excommunication* the only proceſs in the primitive church to inforce obedience, as it is in eccleſiaſtical courts at this day; though, conſidering the many petty and trifling occaſions on which they are, of neceſſity, obliged to have recourſe to theſe arms, having no other, and the many temporal inconveniencies it may be attended with, it has been the opinion of many wiſe and learned, as well as of many pious men, that it would not be unworthy the attention of the legiſlature to deviſe ſome other coercive means for the puniſhment of contempts, and to reſtrain excommunication to extraordinary offences only. Though, if we conſider that the jealouſy which the temporal courts, and the laity in general, ſo juſtly conceived of theſe judicatures in the time of popery, hath not even yet entirely ſubſided, there is little proſpect that this or any other regulation to amend their proceedings, and others they do want, will be attempted.

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† Father Paul, of beneficiary matters.

When the empire became Chriſtian, theſe courts and their authority were fully eſtabliſhed in the minds of the people. However, that the temporal courts might not be ſtripped of their juriſdiction, and churchmen become the ſole judges, a diſtinction was made between matters of ſpiritual and temporal cognizance; not but ſeveral matters, originally and naturally temporal, were allowed, by the grants of the emperors, to the eccleſiaſtical juriſdiction; and even, of ſuch as were not allowed them, they might take cognizance, if both the parties agreed thereto. This was called *proroguing* the juriſdiction, that is, extending, by the conſent of the litigants, its power to matters that do not properly belong to it. A practice our law has moſt juſtly rejected; for it would introduce confuſion, and a perpetual claſhing of courts, if it was in the power of the private perſons to break down the fences that the conſtitution has ſo wiſely erected to keep every judicature within its ſtrict bounds. And indeed this practice was one of the great engines the churchmen made uſe of, in their grand ſcheme of ſwallowing up all temporal juriſdiction and power. The method of trial in theſe courts was by the depoſitions of witneſſes; and upon them the judge determined both the law and the fact.

Trials by jury were entirely unknown to the Romans, though indeed their *centumviral court*, in the early times, bore ſome reſemblance to them; and even when the northern nations, who were the introducers of the trial *per pares*, became Chriſtians, the eccleſiaſtical courts on the continent proceeded in their old manner. But in England, during the times of the Saxons, both ſpiritual and temporal courts, though their buſineſs was diſtinct, ſat together, and mutually aſſiſted each other, as I obſerved under

under the Conqueror's reign. But whether the matter of fact in eccleſiaſtical cauſes was then tried by a jury, I will not pretend to affirm, though, from the peculiar fondneſs the Saxons had, above the other northern nations, for that method of trial, it may ſeem not improbable. However, this is certain, that from the time William, who, to gratify the court of Rome, and to ſhew his own political purpoſes, ſeparated the courts, the proceedings of the ſpiritual ones in England have been conformed to the practice of thoſe courts abroad, and to the canon law. The alteration, if indeed there was any, was ſufficiently authoriſed by the king and pope; and indeed as all the biſhoprics were filled by Normans, they knew not how to proceed in any other manner. By the time of John, the proceedings of theſe courts, and their trial of cauſes without jury, had been univerſally fixed, and received as a part of the *lex terræ*, and, as ſuch, is confirmed by the words of this ſtatute.

The next court that the law of the land allows to proceed to ſentence without a jury is the court of *Admiralty*, and that for abſolute neceſſity; for as its juriſdiction is not allowed as to any thing that happens within the body of a county, except in one particular inſtance, *contracts for ſailors wages*, but extends only to things done on the ſea, or at moſt to contracts made in foreign countries (though this laſt is denied by the lawyers of our days to belong to them) there is no place from whence a jury can come. For the jury of the county, where the cauſe of ſuit aroſe, are the triers, but here, it aroſe in none. Beſides, the great excellency of this method of trial conſiſts in this, that the jury, from their vicinity, have opportunities of knowing ſomething of the nature of the caſe, and of being acquainted with the characters and credit of the witneſſes, neither

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of which can be ſuppoſed in this caſe. In this court the judge determines both matter of law and fact.

The ſame was the caſe of the Conſtable's and Marſhal's Court, formerly of great power, but now next to antiquated. Its juriſdiction was, firſt, *martial law*, over the ſoldiers and attendants of the camp. Now the trial of offenders in this kind, by a jury, whether taken out of the army, or out of the county, if in the kingdom, would have effectually deſtroyed that ſtrict ſubordination, which is the ſoul of military enterpriſes. Secondly, they had the trials of treaſons and felonies done by the king's ſubjects in foreign kingdoms. Here there could be no trial by jury, for the ſame reaſon as given already for the Court of Admiralty. The laſt part of their juriſdiction was as to precedence, arms, and marks of dignity, which flowing immediately from the grace of the crown, the ſole diſpoſer and judge of them, were not ſuppoſed to be in the cognizance of jurors, but proper to be determined by the king's judges, who had the keeping of the memorials of his grants in this kind. Beſides, theſe honorary diſtinctions are not local, but univerſal through the realm; ſo that there is no particular county from whence a jury ſhould come†.

Such are the reaſons aſſigned why theſe two courts proceed *per legem terræ*, and not by juries; but, to ſpeak my own opinion truly, when I conſider that their methods are formed upon the proceedings of the civil law, I ſuſpect a farther deſign. The diſcovery and revival of this law happened in the reign of our Stephen. I have already had occaſion to obſerve how greatly the princes, in every part of

† 4 Inſtitut.

of Europe, were flattered by the tempting bait of unlimited power it ſet before them, and particularly the kings of England, who were the firſt that ſet out in purſuit of this deluſive object; and that their being leſs ſucceſsful than others was, very probably, owing to their beginning the career too early. When I conſider then that theſe two courts, where trials by juries prevail not, dealt in matters that were of the reſort of the prerogative, and that, in conſequence, the modelling of them was left to the king; when I ſee all the parts of theſe models taken from the imperial law; when I reflect on the notoriouſly avowed and unjuſt preference the weakeſt of them gave to that againſt the common law, and the kind patronage the wiſeſt and moſt moderate of them ſhewed to it, and its poſſeſſions, down to the reign of Charles the Second, I cannot help ſuſpecting a deeper deſign. And, indeed, the common lawyers ſeemed to take the alarm, and decried and deſpiſed every part of this law, though moſt of it is founded on good reaſon, merely out of the apprehenſions, that giving it the leaſt countenance, might, in time, open a door for the abſolute authority of the prince, and the rapaciouſneſs of his *fiſc* or treaſury, and thereby overturn the conſtitution.

But there are other courts, beſides thoſe already named, that proceed upon the depoſition of witneſſes, and not by jury, I mean the courts of Equity; which, in imitation of the civil and canon laws, oblige a party to anſwer upon oath to his adverſary's charge. This practice, though not allowed by common law, is founded in very good reaſon. For, as the proper buſineſs of a court of equity is to detect fraud and ſurprize, theſe things being done in private, and endeavoured to be as much concealed as poſſible, it is but reaſonable that the plaintiff ſhould have power to ſift the

the conſcience of his adverſary, and to examine not to a ſingle point, as the *iſſues* at common law are, but to many ſeparate facts, from which, taken together, the fraud, if any, may appear. Such matters, therefore, being of nice diſcuſſion, and of a complicated nature, are not fit for the deciſion of a jury, and indeed would take up more time than they could poſſibly employ in the examination. The court, therefore, go upon *depoſitions*, and judge both of the law and fact. However, if a matter of fact, neceſſary for the deciſion of the cauſe, appears on the depoſition doubtful; or if any matter ariſe which theſe courts have no power to try, they direct an iſſue, wherein the point is tried by jury, in a court of common law; and thus, theſe courts have the advantage of both methods of trial, as well that of the civil, as that uſed by the common law; namely the oath of the party, and depoſitions from one, and the trial by jury from the other.

This method, however, of trial by depoſition, has been objected to, as productive of enormous expence and delays; and it cannot be denied, that, as affairs are now conducted, there is too much reaſon for the objection. Yet to this it may be anſwered, that if examiners were more careful, and would ſet down nothing but what is evidence, and were the rules of court, to cut off delays, always ſtrictly inforced, the damage ariſing from both theſe heads would be conſiderably leſſened. To cut off all delays, and to reduce the proceedings to as ſummary a method as that of the courts of common law would, (conſidering the matters they are converſant about are of different proof, and require the moſt acute examination) inſtead of preventing frauds in moſt inſtances, by a hurried manner of trial, ſerve to defend and encourage them. The policy of the common law was to reduce the matter in queſtion to a ſingle fact,

fact, which the jury might, with eaſe and convenience, determine within a convenient time. And it muſt be owned that the lawyers and judges of latter days, by admitting the trial of titles to lands in perſonal actions, have deviated much from the ſimplicity of the law, and weakened the excellence of the trial by jury. The preſent practice, of determining the title to land by an action of treſpaſs, will ſerve as an inſtance; where the enquiry is, whether a man's entering upon lands was a treſpaſs or not; if he had right to enter in, it was no treſpaſs; if he had not, it was otherwiſe. Now, as the right may depend upon twenty different matters of fact, beſide matter of law, all which muſt be ſettled and weighed, before the bare queſtion of treſpaſs can be determined, it is eaſy to ſee to what lengths trial by juries may be now ſpun; to how ſhort a time the examination of the moſt material points muſt be confined, how imperfect, conſequently, the examination muſt often be; to ſay nothing of the danger of a jury's erring when both body and mind is wearied out with long attendance, and the attention conſequently enfeebled.

If it be aſked, how came this deviation, which has been attended with ſo many inconveniencies? The true anſwer is the beſt, that it ſprung from the advantage of practitioners, and the litigiouſneſs of ſuitors. By the common law, no man could bring two actions of the ſame nature for the ſame thing. If I am entitled to the poſſeſſion of lands, I may bring my *writ of entry*, or an *aſſize*, to recover it; but if I am foiled, I cannot bring a ſecond. So, if I am entitled to the propriety of the land, I may bring my writ of right, and if I recover not therein, my right is gone for ever. The litigiouſneſs of ſuitors, who had a mind to gain a method of trying the ſame thing over and over again, where they miſcarried, introduced this method I

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am ſpeaking of. For every new entry was a new treſpaſs, and could not be ſaid to have been tried before; though whether it was a treſpaſs or not, depends on what had been tried before, and the avarice of practitioners, who deſired frequent ſuits, encouraged it. But when once it was allowed, notwithſtanding all the complaints of Coke and his co-temporary judges, it became univerſally followed, and is now ſo eſtabliſhed, and the higher actions ſo much out of uſe, that I queſtion whether there is a lawyer living who would be able, without a great deal of ſtudy, to conduct a cauſe in one of thoſe antiquated real actions. The inconveniencies of theſe frequent trials introduced, for the obviating them, a new practice, the applying to the court of chancery, after two or more verdicts conſonant to one another, for an injunction to ſtop farther proceedings at law; which, though a new, was become a neceſſary curb, after the common law-courts had allowed the former method.

Beſides theſe courts already mentioned, there are many other judicatories, which, by particular acts of parliament, have particular matters entruſted to their determination, without the intervention of juries; as the ſeveral matters determinable ſummarily by one or more juſtices of the peace; the affairs of the revenue by the commiſſioners; and ſuits by civil bills for limited ſums by judges of aſſize; though in theſe laſt the preſiding judge may, and ought, in matters of difficulty, to call a jury to his aſſiſtance; and it muſt be owned in this poor country the alteration of the law in this laſt particular, has been attended with very good conſequences. The expediency of the two former changes, indeed, has been much diſputed; but that being

a queſtion of *politicks*, not of law, I ſhall not enter into it.

Thus much I have obſerved, in a ſummary way, concerning the ſeveral methods of trial, differing from that *per pares*, which are authoriſed by theſe words of *Magna Charta*, *per legem terræ*.

I ſhall next proceed to the point of the *perſonal liberty of the ſubject*; but as it will be proper to take all that together, in one view, I ſhall here conclude the preſent Lecture.

LEC-

LECTURE XLI.

Continuation of the commentary on Magna Charta.

HAVING explained the import of the words *per legale judicium parium ſuorum, vel per legem terræ,* which refer to, and qualify all the preceding parts, it will be proper to mention thoſe preceding articles, and to make ſome obſervations upon them. They then conſiſt of ſix different heads. The firſt relates to the perſonal liberty of the ſubject; the ſecond to the preſervation of his landed property; the third is intended to defend him from unjuſt outlawry; the fourth to prevent unjuſt baniſhment; the fifth prohibits all manner of deſtruction; and the deſign of the ſixth is to regulate criminal proſecutions at the ſuit of the king. I ſhall briefly treat of all theſe particulars in the order in which they ſtand.

The firſt clauſe tending to ſecure perſonal liberty, runs in theſe words; *Nullus liber homo capiatur vel impriſonetur. Liber homo,* as I before obſerved, here extends to all the ſubjects, and is not to be taken in its more reſtrained ſenſe, of a freeholder. We ſee the words are not barely againſt wrongful impriſonment, but extend to arreſting, or taking, *nullus capiatur.* This act extends not only to prevent private perſons, particularly the great men, from arreſting and impriſoning the ſubjects, but extends alſo to thoſe from whom, on account of their extraordinary power, the great-

eſt danger might be apprehended, I mean the king's miniſterial officers, his council, nay himſelf, acting in perſon. "No man," (ſays my lord Coke, commenting on this point,) "ſhall be taken, that is reſtrained of liberty, "by petition or ſuggeſtion to the king, or his council; "unleſs it be by indictment, or preſentment of good and "lawful men, where ſuch deeds be done." For in that caſe it is *per legale judicium parium*; though an indictment found, or a preſentment made by a grand jury, in one ſenſe, cannot properly be called *judicium*, as it is not concluſive; but the fact muſt be after tried by a petty jury; yet for the purpoſe of reſtraining and ſecuring a perſon accuſed upon record, that he may be forthcoming on his trial, it is *judicium parium*. Otherwiſe the moſt flagrant offenders might eſcape being tried and convicted †.

In the fifteenth chapter of Weſtminſter the firſt, enacted in the third year of Edward the Firſt, and ordained to aſcertain for what offences a man might be detained in priſon, and to make effectual proviſion for the bailing out perſons upon their giving ſecurity to abide a trial, thoſe accuſed of the ſlighter offences, perſons detained *per maundement de roy* by the command of the king, are mentioned as not bailable; and this may ſeem to contradict the law I have now laid down. Yet, when rightly underſtood, it doth not. For as judge Gaſcoigne rightly ſaid, the king hath committed all his power judicial to divers courts, ſome to one, ſome to another; and it is a rule in the conſtruction of ſtatutes, that when any judicial act is referred to the king, it is to be underſtood to be done in ſome court of juſtice, according to law. The command of the king, therefore, doth not mean the king's private will, but a legal

† 2 Inſt. p. 46.

legal command, iſſued in his name, by his judges, to whom his judicial power is intruſted. Accordingly, Sir John Markham, chief juſtice, told Edward the Fourth, that the king could not arreſt any man for ſuſpicion of treaſon, or felony, as any of his ſubjects might; and he gave a moſt excellent reaſon for it: Becauſe, ſays he, if the king did wrong, the party could not have his action. In the ſixteenth of Henry the Sixth, it was reſolved by the whole court, That if the king command me to arreſt a man, and I do arreſt him, he ſhall have his action of falſe impriſonment againſt me, although I did it in the king's preſence.

The maxim, then, is, that no man ſhall be taken and committed to priſon, but by *judicium parium, vel per legem terræ*, that is, by due proceſs of law. Now to underſtand this, it is neceſſary to ſee in what caſes a man may be taken before preſentment or indictment by a jury; and in the enquiry it is to be conſidered, that proceſs of law, for this purpoſe, is two-fold, either by the king's writ, to bring him into a court of juſtice, to *anſwer*, or by what is called *a warrant in law*. And this is, again, two-fold, *indeed*, by the authority of a legal magiſtrate, as a Juſtice of Peace's *mittimus*, or that which each private perſon is inveſted with, and may exerciſe.

Firſt then, for making a *mittimus* a good warrant, it is previouſly neceſſary, that there ſhould be an information on oath, before a magiſtrate having lawful authority, that the party hath committed an offence; or at leaſt of ſome poſitive fact, that carries with it a ſtrong and violent preſumption that he hath ſo done: Next, then, the *mittimus* muſt contain the offence in certain, that it may appear whether the offence charged is ſuch an one as juſtifies the taking;

ing; whether it is bailable, or ſuch as the law requires the detenſion in priſon. A warrant without the cauſe expreſſed, is a void one, and impriſonment on it illegal, and ſo it was adjudged in Charles the Firſt's reign, though done by the ſecretaries of ſtate, by the king's authority, with the advice of his council; thirdly, the warrant muſt not only contain a lawful cauſe, but have a legal concluſion, *and him ſafely to keep until delivered by law*; not until the party committing doth farther order, for that would be to make the magiſtrate, who is only *miniſterial*, *judicial*, as to the point of the liberty of the ſubject; from whence might redound great miſchief to the party on one hand, or to the king and public on the other, by letting an offender eſcape.

Let us ſee how far the law warrants a private perſon to take another, and commit him to priſon. Firſt, then, if a man is preſent when another commits treaſon, felony, or notorious breach of the peace, he hath a right inſtantly to arreſt and commit him, leſt he ſhould eſcape if any affray be made, to the breach of the peace, any man preſent may, during the continuance of the affray, by a warrant in law, in order to prevent imminent miſchief, reſtrain any of the offenders; but if the affray is over, ſo that the danger is perfectly paſt, there is a neceſſity of an information, and an expreſs warrant; ſo, if one man wounds another dangerouſly, any perſon may arreſt him, that he be ſafely kept, until it be known whether the party wounded ſhall die or not. Suſpicion, alſo, where it is violent and ſtrong, is, in many caſes, a good cauſe of impriſonment. Suppoſe a felony done, and the hue and cry of the country is raiſed, to purſue and take the offender, any man may arreſt another whom he finds flying; for what greater preſumption of guilt can there be, than for a perſon, inſtead of joining the hue and cry as his duty prompts him, to fly from it? His good character or

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his innocence, how clear it may after appear, ſhall not avail him. His impriſonment is lawful.

Another lawful cauſe of arreſting and impriſoning upon ſuſpicion is, if a treaſon or felony is certainly done; and though there is no certain evidence againſt any perſon as the perpetrator, if the public voice and fame is, that A is guilty, it is lawful for any man to arreſt and detain him. So, if a treaſon or felony be done, and though there be no public fame, any one that ſuſpects another for the author of the fact may arreſt him. But let him that ſo doth, take care his cauſe of ſuſpicion will be ſuch as will bear the teſt; for otherwiſe he may be puniſhable for falſe impriſonment. The frequent keeping company with a notorious thief, that is, one that had been convicted, or outlawed, or proclaimed as ſuch, was a good cauſe of impriſonment. Laſtly, a watchman may arreſt a night-walker at unſeaſonable hours by the common law, however peaceably he might demean himſelf; for ſtrolling at unuſual hours was a juſt cauſe of ſuſpicion of an ill intent. With reſpect to perſons arreſted by private authority, I muſt obſerve, that the law of England ſo abhors impriſonment, without a certain cauſe ſhewn, that if there is not an information on oath ſworn before a magiſtrate, and his commitment thereon in a competent time, which is eſteemed twenty-four hours, the perſon is no longer to be detained †.

Such is the law of England with reſpect to the perſonal liberty of the ſubject. Let us now ſee the remedies the law provides for thoſe that ſuffer by its being infringed: the writ of *odio & atia* I have already mentioned, and that it is long ſince out of uſe: the moſt uſeful way then to remedy this,

† 2 Inſtitut. p. 51.——55.

this, and to deliver the party, is the writ of *habeas corpus*, in obedience to which, the perſon impriſoned is brought into court by the ſheriff, who is the keeper of the priſon, together with the cauſe of his caption and detention, that the court may judge whether the firſt taking was lawful; and if it was, whether the continuance of the impriſonment is ſuch; and this is brought in the name of the party himſelf impriſoned.

The next is the writ *de homine replegiando*, or replevying a man, that is, delivering him out upon ſecurity, to anſwer what may be objected againſt him. This is moſt commonly uſed when a perſon is not in the legal priſon, but perhaps carried off by private violence, and ſecreted from his friends, and therefore may be brought by a near friend having intereſt in the perſon's liberty, as by a father, or mother, for their child, or a huſband for his wife. Theſe are the remedies for reſtoring a perſon unjuſtly deprived of liberty, to the enjoyment of that invaluable bleſſing. But very deficient would theſe remedies be, if there were no proviſions made for the puniſhment of a perſon offending againſt his natural right, nor any relief for the perſon unjuſtly aggrieved.

For the point of puniſhment, an indictment will lie at the king's ſuit, againſt the falſe impriſoner, grounded on this ſtatute, for the vindication of the public juſtice of the nation; and the party, if found guilty, ſhould be puniſhed by fine and impriſonment. For the relief of the perſon injured, he may have an action of falſe impriſonment, wherein he ſhall recover damages; or an action on the caſe grounded on this ſtatute, wherein he ſhall have the ſame remedy. For Coke obſerves on this ſtatute, that it is a general

neral rule, where an act of parliament is made againſt any public miſchief or grievance, there is either given expreſsly, or elſe implied by the law, an action to the party injured.

Such is the antient original law of England with reſpect to liberty; and ſo different from that of other nations of Europe, at leaſt, as their laws are underſtood and practiſed at preſent, where a man may be impriſoned without knowing his crime or accuſer, or having any means, except of humble petition, to be brought to his trial. It is therefore no wonder that the people on the continent envy much the ſituation of the ſubjects of theſe iſlands, when they contemplate their own.

The next branch of the ſtatute is, *Nullus liber homo diſſeizetur de libero tenemento ſuo, vel libertatibus, vel liberis conſuetudinibus ſuis.* Here it may be thought the word *liber homo* ſhould be reſtrained to freeholders, becauſe none others can be diſſeized; but the following words, *libertatibus*, and *conſuetudinibus*, lead, by their import, to a more enlarged conſtruction, and take in all the ſubjects; ſo that *diſſeizetur* muſt not be taken in its limited peculiar ſenſe, but rather in general for *deprivetur*. Firſt, then, no freeholder ſhall be diſſeized of his freehold, but by verdict of a jury, or by the law of the land, as upon default, not pleading, or being outlawed. It was made to prevent wrongful entries, by ſuch as had right or pretended right to the land, in order to avoid breaches of the peace and bloodſhed, which often enſued thereon; but it was not intended to take away the entry of a perſon who had a right to enter given him by law, for that the law could never conſtrue a *diſſeizen*, which is a wrongful diveſting of the freehold.

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To underſtand this, it is neceſſary to obſerve, that a man may have right to the lands, and yet no right to enter upon them; or he may have both; and in the laſt caſe it is no diſſeizen. If A diſſeizes B, he ſhall never, by his own wrongful act, deprive B of the right of poſſeſſion; but he may of his own authority enter at any time, during A's life, provided he doth it without breach of the peace. But if A is dead, now the lands being thrown by the law upon A's heir, who had no hand in the wrong, and who is anſwerable to the Lord Paramount for the ſervices due from the land, B has, by his own negligence, in not entring, or if he could not enter, claiming, during A's life, loſt the right of poſſeſſion; it is transferred to A's heir, and B muſt recover his right by a ſuit at law.

To ſee what is meant by *libertatibus*. It comprehendeth, in the firſt place, the laws of the realm, that every man ſhould freely enjoy ſuch advantages and privileges as theſe laws give him. Secondly, it ſignifies the privileges that ſome of the ſubjects, whether ſingle perſons, or bodies corporate, have above others, by the lawful grant of the king; as the chattels of felons or outlaws, and the lands and privileges of corporations. Hence any grant of the king, by letters patent to any perſon, which deprives another ſubject of his natural right and free liberties, is againſt this branch of *Magna Charta*, as are all monopolies, which were ſo plentifully and ſo oppreſſively granted in the reigns of Elizabeth and James the Firſt, and here in Ireland, in that of Charles the Firſt. We muſt, however, except ſuch monopolies as are erected by act of parliament, or by the king's patents, purſuing the directions of an act made for that purpoſe †.

Laſtly,

† 2 Inſt. p. 47.

Laſtly, *Conſuetudinibus* takes in and preſerves thoſe local cuſtoms in many parts of England, which, though they derogate from the common law, are yet countenanced and acknowledged as part of the general ſyſtem of law. It alſo extends to any privileges which a ſubject claims by preſcription, as wreck, waif, ſtray, and the like †.

The next clauſe is, *aut utlagetur*; of which having ſpoken already, I ſhall paſs on to the fourth, *aut exuletur*. No man ſhall be baniſhed out of the realm, *niſi per legem terræ*; for the *judicium parium* is out of this clauſe, there being no crime of which a man is convicted, whoſe ſentence is baniſhment. The *tranſportation* now commonly uſed for ſlighter felonies is not like it; for that is by the free conſent of the criminal, who deſires to commute a heavier puniſhment for a ſlighter. Now *per legem terræ* a man may be exiled two ways, either by act of parliament, as ſome wicked minions of our former kings were, and particularly Richard the Second's corrupt judges into Ireland; or by a man's abjuring the realm when accuſed of felony, that is, ſwearing to depart out of the kingdom, never to return; which latter is long ſince fallen into diſuſe. Coke ſays, that the king cannot ſend any ſubject againſt his will to ſerve him out of the realm, and the reaſon is ſtrong; for if he could under pretence of ſervice, he might tear him from his family and country, and tranſport him to the remoteſt corner of the earth, there to remain during the whole of his life ‡. But what ſhall we ſay as to the military tenants, who by the very tenure of their grants were obliged to ſerve the king in his wars out of the realm? Certainly, whilſt the feudal ſyſtem retained its priſtine vigour, and perſonal ſervice was required, they were an exception to this

† 2 Inſtit. p. 47. ‡ Ibid.

this rule; but when the commutation of *eſcuage* was eſtabliſhed, they were conſidered as under it. Indeed their general readineſs to attend their king's ſervice in perſon, gave no occaſion for this queſtion's ever being decided. The famous caſe on this point was in Edward the Third's reign; that prince had made many grants to Sir Richard Pembrige, ſome for *ſervitio impenſo*, others for *ſervitio impendendo*. The king commanded him to ſerve in Ireland, as his Lord-deputy, which he poſitively refuſed to do, looking upon the appointment as no better than an exile; and for this refuſal the king ſeized all that had been granted to him *pro ſervitio impendendo;* and the queſtion came on in court, whether the ſeizure was lawful. The judges clearly held the refuſal lawful, and therefore would not commit him to priſon; but as to the ſeizure in conſequence of the words *pro ſervitio impendendo*, without ſpecifying where, they thought it juſtified. But Coke ſays, "it "ſeemeth to me that the ſeizure was unlawful." For *pro ſervitio impenſo*, and *impendendo*, muſt be intended of lawful ſervice within the realm. The laſt time this act was violated was in the reign of the miſguided James the Firſt, in the caſe of the unfortunate Sir Thomas Overbury; who for refuſing to go ambaſſador to Muſcovy, was by that prince ſent to the Tower, in which place he was afterwards barbarouſly poiſoned; and for his murder the favourite Somerſet and his counteſs were both condemned to die *.

* 2 Inſt. p. 84.

LEC-

LECTURE XLII.

Continuation of the commentary on Magna Charta.

THE fifth branch of this ſtatute is in very general terms; it is, *aut aliquo modo deſtruatur.* "*Deſtruc-*"*tion*" is a word of very general import. Coke, in the firſt place, explains it by ſaying, "no man ſhall be fore-judged "of life or limb, or put to the torture or death, without "legal trial." But he ſhews, afterwards, by his inſtances, that it is much more extenſive: For he obſerves, that "when *any thing* is prohibited, *every thing* is prohibited "which neceſſarily leads to it." Every thing therefore, openly and viſibly tending to a man's deſtruction, either as to life, limb, or the capacity of ſuſtaining life, is hereby directly forbid: So that, *torture*, as it endangers life and limbs, and may prevent a man from earning his livelihood, is, on all theſe three accounts, unlawful, though common among all other nations of Europe, who have borrowed it from the old Roman law with reſpect to ſlaves; a plain indication in what light the introducers of it looked on their ſubjects. It cannot be ſaid that this hath never been violated in England in arbitrary times; (as what nation is there, whoſe fundamental laws have not been, on occaſion, violated?) yet, in five hundred years, I do not believe the Engliſh hiſtory can afford ten inſtances †.

For

† 2 Inſt. p 48.

For the ſame reaſon, " judging a man, either in a civil " or criminal cauſe, without calling him to anſwer and " make his defence," is againſt this proviſion. So likewiſe is " the not producing the witneſſes, that the party " may have an opportunity to croſs-examine them," I believe, if they may be had. For in the caſe of death, or abſence in a foreign country, that they cannot be produced, there is an exception, for very neceſſity's ſake; and in that caſe, the examination of ſuch perſon, taken before a proper magiſtrate, is good evidence, tho' thereby the party loſes the croſs-examination or information againſt the murderer. But whenever this happens, the jury ſhould conſider that the party has loſt the benefit of the croſs-examination, and have that in their contemplation, when they are preparing to give their verdict. Directly contrary to this fundamental law, and to common juſtice, was the trial of Sir Walter Raleigh, conducted by Coke, attorney-general, upon the depoſitions of people who might be brought face to face. For, notwithſtanding the perfect knowledge of that great lawyer in the laws of England, he was a moſt time-ſerving miniſter of the crown. The people of theſe nations are much indebted to him for his excellent writings on the law, and more for demonſtrating the antient right of the people of England to the liberties they claimed: But, if we conſider that he was then in diſgrace at court, I fear this panegyric muſt be confined to his behaviour while a judge, which was without reproach; nor did he heſitate to forfeit the favour of the crown, by oppoſing incroachments on the law of England.

As *tending to deſtruction*; it is likewiſe unlawful to amerce or fine a man convicted of a crime, beyond what he has a poſſibility of paying; for that would tend to perpetual impriſonment, and diſabling him from maintaining himſelf and

and family. Neither is it lawful, tho' a man be indicted of treaſon or felony, for the king to grant, or even to promiſe, the forfeiture of his lands or goods; for this would be throwing a temptation in the way of others to ſuborn witneſſes to his deſtruction. Theſe I mention, only as particular inſtances, to open the import of this law; but the words are *aliquo modo deſtruatur*, taking in "every "thing that directly tends to deſtruction." And it muſt be obſerved that theſe words, *aliquo modo*, are not in any other branch of this act.

I come now to the laſt clauſe of this firſt part, *nec ſuper eum ibimus, nec ſuper eum mittemus, niſi per legale judicium parium ſuorum, aut per legem terræ.* I obſerved before, from the words here being in the firſt perſon, that they refer to the ſuit of the king; and they relate not only, by the latter words, to a legal trial, as to matter and form, but alſo to a trial in a proper and legal court. The words *nec ſuper eum ibimus* belong to the King's Bench, where the ſuits of the king, the *placita coronæ*, are properly handled, and where the king is always ſuppoſed to be preſent. The words *ſuper eum mittemus* refer to other courts ſitting for the ſame purpoſes, as Juſtice of gaol-delivery, for inſtance, under the king's commiſſion. But when thoſe words are coupled with the following ones, *per legem terræ*, they carry a farther import; not only that the courts, trying the king's cauſes ſhould proceed according to the law of the land, but that the courts themſelves ſhould be ſuch as the *lex terræ* authorizes; that is, either the common law, from time immemorial, or acts of parliament. So that the king hath no power, of his own authority, to form new criminal courts, as he may civil ones. In ſome caſes, he appoints, indeed, the judges of the courts of common law,

and

and iſſues commiſſions, and appoints the commiſſioners in criminal courts authorized by parliament; but no farther doth his power extend.

To this it may be objected, that the king may create a county palatine, and conſequently new criminal courts; but let this be conſidered: Counties, and duchies, ſuch as we call *palatine*, were, I may ſay, indeed of the eſſence of a feudal kingdom, as ours originally was; that is, the king might diſmember a part of his kingdom from the immediate ſubjection to the crown, transfer a ſubordinate degree of the legal rights to a ſubject; and when a county of that kind was created, without ſaying any more, all the courts, not new ones, but the ſame that were at common law through the whole kingdom, followed as incidents; in the ſame manner as by erecting a new county, not palatine, it had its county-court, and the ſheriff's tourne. Theſe are not erecting, properly ſpeaking, new courts, ſo much as bringing the old ones home to the doors of the people of that diſtrict.

As I obſerved at the beginning, this law naturally divides itſelf into two parts, the firſt ending at the words *per legem terræ*. Having made ſuch obſervations as have occurred to me as neceſſary or material for the underſtanding thereof, I now proceed to the latter part of this ſtatute, which runs in theſe words: *Nulli vendemus, nulli negabimus, aut deferemus juſtitiam vel rectum.* Some have imagined that, by theſe words, in the disjunctive, are meant common law and equity; but courts of equity, and proceedings in caſes of equity in thoſe courts, were not known in times ſo early; and the legal ſignification of *rectum* in old ſtatutes, and law-books, is either the right that a man hath to a thing,

thing, or the law of the land, the means of attaining the poſſeſſion and enjoyment of that right; and in that ſenſe it is here to be taken; as Coke ſays, *juſtice* is the end, *rectum* the means, namely, due proceſs of law; neither of which is to be ſold, denied, or delayed to the ſubject. In order to underſtand this, it will be neceſſary to point out ſome of the miſchiefs that were before this act, which is the ſureſt way to expound the meaning of any law †.

For this purpoſe it is to be remembered, that, in the Saxon times, almoſt all ſuits, except between grandees, were expedited in the county-courts. I have obſerved before, that the Conqueror and his ſucceſſors diſcouraged theſe, and encouraged ſuits in the *Aula Regis*, or king's courts; and that the ſubjects were fond of ſuing there; but ſtill it was a matter of favour, where the cauſe properly belonged to the country juriſdictions, and could not be demanded as a right. As a matter of favour, it might be denied by the king, or his chancellor, who was the iſſuer of the original writs, unleſs a ſum of money was paid, ſuch as they demanded. This was *ſelling* juſtice. Or, if the perſon to be ſued was a favourite of the king, or chancellor, the writ might be denied; this was *denying* juſtice. Or, if it was granted, as the proceedings were *ex gratia*, the party might, *ad libitum*, be delayed by the judges, or the cauſe might be ſtopped by order of the king, and this was the *deferring* of juſtice, meant by this act, which was intended for the giving every ſubject a right, in all caſes, and againſt all perſons, to have juſtice adminiſtred to him in the king's courts. The chancellor now is hereby obliged inſtantly to iſſue all original writs, and the judges of the ſeveral courts, where cauſes depend, to iſſue the proper ju-

† 2 Inſtitut. p. 55, 56.

dicial ones without fee or reward. This, however, is not ſo to be underſtood, as to prohibit the moderate and accuſtomed fees, which, from time immemorial, have been paid to the officer, for his trouble in making them out, or to the judge, for putting the ſeal; for theſe are a part of their livelihood, but only thoſe arbitrary ſums which were before taken, and which the ſtate properly calls the *ſelling* of juſtice. So likewiſe the judges are obliged, in every cauſe before them, to proceed with expedition, and to ſuffer no delays, but ſuch as the law allows, and requires, for giving each party an opportunity of defence, and of laying his cauſe fully before the court.

However, notwithſtanding this act, the evil was often repeated, and many ſuits ſtopped by the command of the king, and others, as appears by four ſeveral acts of parliament, made to enforce and explain this one, the ſubſtance of which acts is ſummed up by Coke in theſe words: That "by no means common right, or common law, "ſhould be diſturbed or delayed; no, though it be by "command, and under the great ſeal, or privy ſeal, order, "writ, letters, meſſage, or commandment whatſoever, "either from the king, or any other; and that the juſ-"tices ſhall proceed, as if no ſuch writs, letters, order, "meſſage, or other commandment, were come to them." However, this is not to be underſtood ſo ſtrictly, but that the king may ſtop his own civil ſuit that he hath inſtituted for his own benefit, as a *capias* for a fine, becauſe *quiſque juri ſuo renunciare poteſt*; and this ſtoppage, in truth, is for the benefit of the ſubject. It is otherwiſe in criminal accuſations, unleſs he can ſhew good cauſe to the court to put it off. For every man accuſed has a right to be brought to his trial.†

Neither

† 2. Inſtitut. p. 56.

Neither are legal protections within the prohibition of this law; these were granted to stop suits against any man that was personally employed in the service of the king, and were founded on this presumption, that such service was for the public benefit, to which all private regards must give way. But then these protections, must be legal ones, such, and none other, as are found in the Register, the antientest book of the law, and not ones newly devised, and for new-fangled causes. These protections, however, were greatly abused in the sequel; favourites, and their dependants, frequently obtaining them, to hinder others of their just rights, under pretence of serving the king; where in truth, there was no such thing. It is therefore recorded, highly to the honour of Elizabeth, that she first discontinued the granting them; and her laudable example has been followed by all her successors. I shall, therefore, not dwell upon them, it being sufficient to have mentioned that such things there are, or at least *were* in our law.

I hope the prolixity with which I have treated of *this* chapter of *Magna Charta*, the care I have taken to open the true meaning and force of every word in it, and the many tacit exceptions each part of it is subject to, will be excused, when it is considered, that it not only contains great variety of matter, but is the most important, and of more general consequence and concern, than any other law of the land. It is the guardian of the life, the liberty, the limbs, the livelihood, the possessions, and of the right to justice of every individual, and therefore it concerns every man to know it, and fully to understand it.

The thirtieth chapter is in favour of commerce and merchant strangers. Certain it is, that, in antient times, the kings of Europe, and their military subjects, looked on

merchandize as a diſhonourable profeſſion; as did the Romans alſo, in the military ages of that republic. By the old laws of England, no merchants alien were to frequent England, except at the four great fairs; and then were permitted to ſtay but forty days at a time, that is, an hundred and ſixty days in the whole year. But now this act has altered the former law, and is very favourable to perſons engaged in commerce, who before were little better than at ſufferance. It commands, that all merchants, namely, merchant ſtrangers, whoſe ſovereign is in amity with the king, unleſs publicly prohibited, that is, ſays Coke, by Parliament, which is true, as the law hath ſince ſtood, (but before, I conceive the king himſelf had the power to prohibit) ſhall have ſafe and ſure conduct in ſeven things. Firſt, to depart out of England without licence, at their will and pleaſure. Secondly, to come into England in the ſame manner. Thirdly, to continue in England without limit of time. Fourthly, to go and travel through any part of England at their pleaſure, by land or water. Fifthly, free liberty to buy and ſell. Sixthly, without any manner of evil, tolls or taxes; but only, Seventhly, by the old and rightful cuſtoms, that is, by ſuch duties as were of old time accuſtomed to be paid, and are therefore called *Cuſtoms*. By this law the king is prohibited from laying any new taxes on the imports or exports of merchant ſtrangers. And as now they gained a general licence to continue in the realm, from hence aroſe that privilege of merchant ſtrangers to take leaſes for years, of houſes for their dwelling, and warehouſes for their goods, whilſt they continued in England; for, regularly, all acquiſitions of aliens, in lands or tenements, belong to the king†.

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† 2 Inſtitut. p. 57. et ſeq. Barrington on the ſtatutes, p. 23. 25.

The ſecond branch of this act is a very equitable one. It concerns merchant enemies, or rather ſuch merchant ſtrangers as came in friends, and afterwards became enemies, by a war's breaking out between the ſovereigns while they are in England. It provides that, on a war's ſo breaking out, the perſons and effects of ſuch merchants ſhould be ſeized, and ſafely kept 'till it ſhould be known how the Engliſh merchants had been treated in the enemy's country; and that, if they were well treated, theſe ſhould be ſo too. This regulation, however, is not put in uſe; becauſe, by the treaties made between the ſovereigns of Europe, it is ſtipulated, that, on the breaking out of war, the merchants in each others country ſhould have a certain number of days to withdraw themſelves and their effects. But if a merchant enemy comes into the country, after war declared, he is to be treated as an enemy; to which, by the old law, now antiquated, there was a very humane exception, that of perſons driven into England by ſtreſs of weather.

LEC-

LECTURE XLIII.

Continuation of the commentary on Magna Charta.

AS I have dwelt on the twenty-ninth chapter of *Magna Charta* ſo long, and treated of it and every part of it ſo minutely, I ſhall, in this lecture, diſpatch the remaining part thereof with more expedition. Indeed, of the thirty-firſt I would have ſaid no more, than merely to obſerve, that it related to the military tenures now aboliſhed, were it not proper to remark, that it was made to enforce the old feudal law, then the law of England, with reſpect to land eſtates, and to reſtrain John's ſucceſſors from the violences he had introduced in favour of the royal prerogative, to the detriment of the immunities and privileges of the ſubjects. It has been already obſerved in theſe lectures, that, by the feudal law, eſpecially as eſtabliſhed by the Conqueror in England, the king was very amply provided for with a landed eſtate, to ſupport his dignity and expences, which was at that time looked on all over Europe as unalienable, except during the life of the king in being; and that the reſt of the land was to be the property of the free ſubjects of the realm, ſubject to the ſervices impoſed, and the other conſequences of his ſeignory as feudal lord.

One of theſe conſequences was the eſcheat on the failure of heirs, either by there being none, or by the blood being corrupted by the commiſſion of felony, which in law amount-

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ed to the ſame thing; as no ſon, uncle, nephew or couſin, could by law claim as heir by deſcent to a perſon attainted. For the legal blood, the title to the inheritance, failed in him the laſt poſſeſſor, by his breach of fealty; and every heir lineal or collateral by the law of England being obliged to claim as heir to the perſon laſt ſeized, muſt be excluded, when the legal blood inheritable failed in the laſt poſſeſſor.

In conſequence of theſe eſcheats, which often happened in thoſe times, both by corruption of blood, and failure of heirs inheritable, (for, as I have obſerved before, the granting *feuda antiqua ut nova* was introduced only by Henry the Second, the father of John, and were not at this time become univerſal, as they ſince have been) John introduced this new maxim, that when an earldom or barony fell to the crown by eſcheat, he held it in the right of his crown, as it was originally derived from thence; and conſequently, that the tenants of the former lord, being now, inſtead of *intermediate*, become *immediate* tenants of the crown, held of him *in capite*, as it was called; that is, that he, by this eſcheat, obtained privileges over the tenants of the former lord, which he, the former lord, never had, or could have, but which he claimed as king, *in jure coronæ*. Theſe privileges were many in number; but it will be ſufficient to mention only two of them, to ſhew into how much worſe a ſtate the tenants of theſe eſcheated lordſhips were thrown, by being conſidered as tenants *in capite*.

Firſt, then, the king had from his tenants *in capite*, who came into poſſeſſion of their lands at full age, inſtead of *relief*, to which ſubject lords were entitled, and which was only one fourth of the value of the lands, his *primeir ſeizen*, which was the whole year's value. Another grievance was

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with reſpect to the wardſhip of military tenants under age. As to the tenants *in capite*, the king had, by his prerogative, a right not only to the wardſhip of the perſon of his minor tenant, and of the lands he held of him *in capite*, but alſo of all other lands held by knight-ſervice of any other perſon. For as to ſocage lands, they were to be in the hands of the next of kin, to whom the inheritance could not deſcend, who, at the infant's full age, was to be accountable for the profits: and under the pretence of ſuch tenants, upon the ſuperior lord's eſcheat, becoming tenants *in capite*, John claimed and exacted the privilege, to the detriment of the other lords. Theſe and other miſchiefs, for others there were, as I obſerved before, and ſome of them are mentioned in this ſtatute, are remedied by the general proviſion which reſtored the feudal law, that the king ſhould hold all ſuch eſcheated lordſhips in the ſame right they were before held, and have no other privilege, but what the lord by whoſe eſcheat they fell to him had: in a word, that he ſhould hold them as lord of that lordſhip, not as king †.

The thirty-ſecond chapter relates to the alienation of lands, and gives a qualified power of that kind. By the feudal law, as it was introduced at the Conqueſt, no lord could alien his ſeignory without the tenants conſent, ſo neither could the tenant his tenancy, without approbation of the lord. Theſe ſtrict rules were firſt broken into, in thoſe ſuperſtitious times, in favour of churchmen; afterwards, in Richard the Firſt's time, to raiſe money for the holy war. Not but the ſubjects, by their inſiſting on Edward the Confeſſor's laws, of which free alienation was a part, ſeemed to be fond of it. However, the kings, in all their grants

† 2 Inſtitut. p. 64.

grants of the old Engliſh laws, were careful to preſerve the feudal ſyſtem, in guarding againſt the alienation of the military tenures. Coke, in commenting on this ſtatute, in order to the better underſtanding thereof, makes three obſervations relative to what was the common law before this ſtatute; in the laſt of which I apprehend he is miſtaken, as the law then ſtood; and that what he aſſerts therein to have been law did not become ſo (though often in practice) till after the ſtatute *quia emptores terrarum*, in Edward the Firſt's reign.

His firſt obſervation is, that the tenant might have made a feoffment of the whole, or a part of his tenancy, to hold *of himſelf*; and no doubt but he might. This was the uſual caſe of ſubinfeudation, by which the lord was in no ſort prejudiced; for his ſeignory remained entire, and he might diſtrain in any part for his whole ſervice; and in ſuch caſe, if the under tenant was aggrieved, he was to have his remedy againſt his immediate landlord the *meſne*, (or middle perſon), as he is called in our law.

The ſecond obſervation is, that the tenant could not alien in fee *a part* of the tenancy, to hold, not of himſelf, but of the lord, than which nothing could be more reaſonable, for it would have been againſt theſe old rules alſo, for a tenant to bring in another, as immediate vaſſal to the lord, without his the lord's conſent. The tenant would by that means diſmember the ſeignory, which he received entire, and ſo deprive the lord of his right of diſtraining in the whole, and confine him merely to that part remaining in his own hands, as original tenant. For as to the part of the *alienee*, he could not diſtrain that for his ſervice, there having been no feudal contract between them. Such alienation,

nation, therefore, unleſs when the lord accepted the *alience* as a tenant, was a breach of fealty, and againſt the old feudal principles, and conſequently unlawful in England.

The third obſervation Coke makes on this ſtatute, is, that by the common law the tenant might have made a feoffment of the whole tenancy, to be holden of the lord. For, ſays he, that was no prejudice at all to the lord ‡. But though this certainly prevailed as common law, long before either Coke or Littleton wrote, I cannot held thinking, both becauſe it was contrary to the old feudal law, and alſo from the words of the ſtatute *quia emptores terrarum*, that it was firſt introduced by that act of parliament, the words of which are, *de cætero liceat unicuique libero homini terras ſuas, ſeu tenementa ſua vel partem, inde vendere.* Here the alienating the whole is declared from henceforth lawful; which words had been nugatory, if this had been common law before.

The chapter of *Magna Charta* of which we are ſpeaking, was, then, the firſt poſitive law that allowed the free alienation of lands. It, in one ſenſe, enlarged, whilſt in another it expreſsly reſtrained, the power of the tenant; whereas, before he might alien the whole, or part of his tenancy in fee, but ſubject to the diſtreſs of the lord. Now, by this ſtatute, he was confined to an alienation only for ſo much, that, out of what remained, the lord might have ſufficient diſtreſs for his entire ſervice, and the part conveyed was in the *alienee*'s hands, free from any future diſtreſs by the lord, or ſervice due to him, fealty only excepted. But it not

‡ 2 Inſt. p. 65.—67.

not being ſpecified, how much of the land was a ſufficiency, though the half, or what was the half in value, was, in common eſtimation, reputed ſuch, the tenants, under this pretence, would alien more; which gave occaſion to many diſputes and ſuits, and the propenſity to general alienations continuing, the law called *quia emptores terrarum*, already mentioned, was at length made, which gave a general licence to alien the whole, or a part at pleaſure, to hold of the ſuperior lord; and this put an end, in the law of England, to ſubinfudation of fee ſimples. For, ſince the paſſing that law, if a man infeoffs another of the whole or part of his land, there is no tenure between the feoffer, and feoffee, but the feoffee holds of the feoffer's lord. But as to lower eſtates, as fee tail eſtates for life, years, or at will, ſubinfudation remains; becauſe the whole eſtate is not out of the donor, or leſſor, but a reverſion remains in him; wherefore the tenure, in ſuch caſe, is of the donor or leſſor.

By the ſtatute of *Magna Charta*, in caſe of alienation of part, to hold of the lord, the reſidue remaining in the original tenant's hands, was to anſwer the ſervices, and the *alienee* held of the lord, by fealty only. But now by the ſecond chapter of the forementioned ſtatute, the ſervices were to be apportioned, that is, divided in proportion to the value of the lands. If half of the lands, not in *extent*, but *value*, was aliened, the *alienee* paid half: if one third, the like quantity. I have obſerved before, on this ſtatute of *quia emptores*, that the king, not being named, was not bound by it. For his tenant *in capite* to alien without licence was a forfeiture, until, in the reign of Edward the Third, a fine for alienating was ſubſtituted in the place of the forfeiture, which fine continued until the reſtoration, when it was aboliſhed.

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The thirty-third chapter provides, that the patrons, that is, the heirs of the founders of abbeys, who, by title under the king's letters patent, or by tenure, or antient poſſeſſion, were intitled to the cuſtody of temporalities, during the vacancy of the abbey, ſhould enjoy them free from moleſtation of any perſon, or of the king, under the pretence of the prerogative †.

The thirty-fourth chapter is relative to appeals of murder, brought by private perſons. When a man is murdered, not only the king, who is injured by the loſs of a ſubject, may proſecute the offender, but alſo the party principally injured, that is, the widow of the deceaſed, if he had one; for ſhe, as having one perſon with him, ſtands intitled to this remedy in the firſt place; but if he left no widow, his heir at law might purſue it. It follows, therefore, that a female heir might, by the common law, have brought an appeal of murder, as the daughter, or the ſiſter, if there had been neither children or brother. But this ſtatute alters the common law, and takes away the appeal, in ſuch caſe, from every woman, except the widow; ſo that, at this day, if a man be murdered, leaving no widow, and his next heir be a female, no appeal of murder can be brought. But this diſability is perſonal to women; for though a daughter or ſiſter, living, can bring no appeal, though heir, yet, if they be dead before the murder, leaving a ſon who is heir, he may bring it ‡.

I ſhall now make a few obſervations on the right of the widow's bringing ſuch appeal. Firſt, then, the man ſlain muſt be *vir ſuus*, as the ſtatute expreſſes it. If, therefore, they

† 2 Inſt. p. 68. Barrington, p. 25.

‡ Ibid. p. 68, 69.

they had been divorced, the marriage being diſſolved, ſhe could not have an appeal. It was otherwiſe, if they had been only ſeparated *a menſâ & thoro;* for then he ſtill continued her huſband. He ceaſes likewiſe to be *vir ſuus*, if ſhe ceaſes to be his wife or widow. Therefore, by her marrying again, her appeal is gone, even though the ſecond huſband ſhould die within the year, the time limited for bringing it. This is carried ſo far, that though ſhe brings an appeal while a widow, yet if ſhe marries while it is depending, it ſhall abate for ever. So if ſhe has obtained judgment of death againſt the *appellee*, if ſhe marries before execution, ſhe can never have execution againſt him. In one point the heir is leſs favoured in appeals than the widow; for if the perſon murdered had been attainted of high treaſon, or felony, ſo that his blood was corrupted, the heir could not have it; for the civil relation between them was extinguiſhed, by the anceſtor's civil death: but the relation of huſband and wife depends on the law of God, who has declared the bond indiſſoluble; therefore no law of man came make him ceaſe to be *vir ſuus*, and, in ſuch caſe, ſhe ſhall have an appeal.

The thirty-fifth chapter treats of the county-courts†; but having already, in a former lecture, mentioned what appeared to me ſufficient on that ſubject, I ſhall proceed to the next, *viz.* the firſt law made to prevent alienations in mortmain. Lands given to a corporation, whether ſpiritual or lay, are ſaid to fall into *mortmain*, that is, into a dead hand, an hand uſeleſs and unprofitable to the lord of the fee, from whom he could never receive the fruits. There could be no eſcheat, either for want of heirs, or felony, becauſe the body never died, nor was capable of committing felony. For the ſame reaſon of its never dying, there could be no wardſhip, or relief; neither could there

there be marriage. But beſides the loſs to the lords, the public alſo ſuffered; for the military ſervice the lands were ſubject to, were often withdrawn, or at leaſt, very inſufficiently performed.

Theſe alienations, without the conſent of the ſuperior lord, were directly againſt the feudal polity; yet ſuch was the power of the clergy, who were the principal gainers thereby, in thoſe ages, and ſo great their influence, that they were not only tolerated, but univerſally practiſed, through all Europe; for the founding of a monaſtery was the uſual atonement for the moſt atrocious crimes. In England, particularly, from the acceſſion of the Conqueror to that of John, containing one hundred and thirty-four years, there were no leſs than an hundred and four monaſteries founded, many of them very richly endowed, beſides particular benefactions made to them and the old ones. No wonder, then, it was found neceſſary, by laws, to put a ſtop to the growing wealth of the church; but the reign of John, a vaſſal to the Pope, was not a time to expect a remedy. Accordingly, this act goes no farther than to remedy a colluſive practice, by which a vaſſal, to defraud his lord of the fruits of his ſeignory, made over his lands to a convent, and took it back to hold from them; and to that end, the ſtatute declares the land, in ſuch caſe, forfeited to the lord.

I ſhall ſay no more on this point, nor of the many cunning practices churchmen, in after times, put in uſe, by the advice of the moſt learned lawyers they could procure, in order to creep out of this, and every other ſtatute made to reſtrain them, and for employing which, Coke ſays, they were much to be commended. But he has forgot to tell us whether he thought thoſe great lawyers deſerved commendation

commendation, for finding means to elude the moſt beneficial laws of the land. It will be enough here to ſay, that, from theſe devices, aroſe, in time, the wide-ſpreading doctrine of *uſes and truſts*, which have over-run our whole law, and that the judicial powers of courts of equity have grown with them†.

The next chapter was made to reſtrain the intolerable exactions of *eſcuage* which John had introduced, and forbids the aſſeſſing it, in any other manner than was uſed in the time of Henry the Second, his father, that is, as I obſerved under that reign, very moderately; ſo that every man had his option, whether he would ſerve in perſon, or pay it‡.

Next comes the thirty-eighth, which is the concluſion. Firſt, it ſaves to the ſubjects all other rights and privileges before had, though not mentioned herein. Coke obſerves, that there is no ſaving for the *prerogative of the king*, or his heirs; for that would have rendered all illuſory. Secondly, it ordains that the king and his heirs ſhould obſerve it. Thirdly, that all the ſubjects ſhould. Fourthly, it recites, that, in conſideration hereof, the king received from the ſubjects a grant of the fifteenth of their moveables. For *Magna Charta* is not merely a declaration of the old laws, but alters them in many inſtances; for which favourable alterations the ſubjects made this grant, and thereby became purchaſers of them. Fifthly, it prohibits the king, and his heirs, from doing any thing whereby theſe liberties might be infringed or weakened; and declares all ſuch doings null and void. Laſtly, comes the alteration of twelve biſhops,

† 2 Inſt. p. 74, 75. Barrington, p. 27.

‡ Ibid. p. 76. See alſo 1 Inſt. lib. 2. cap. Eſcuage. Barrington, p. 28.—31.

attestation

bishops, and nineteen abbots, and thirty-one earls and barons†.

† 2 Inst. p. 76.—78.

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